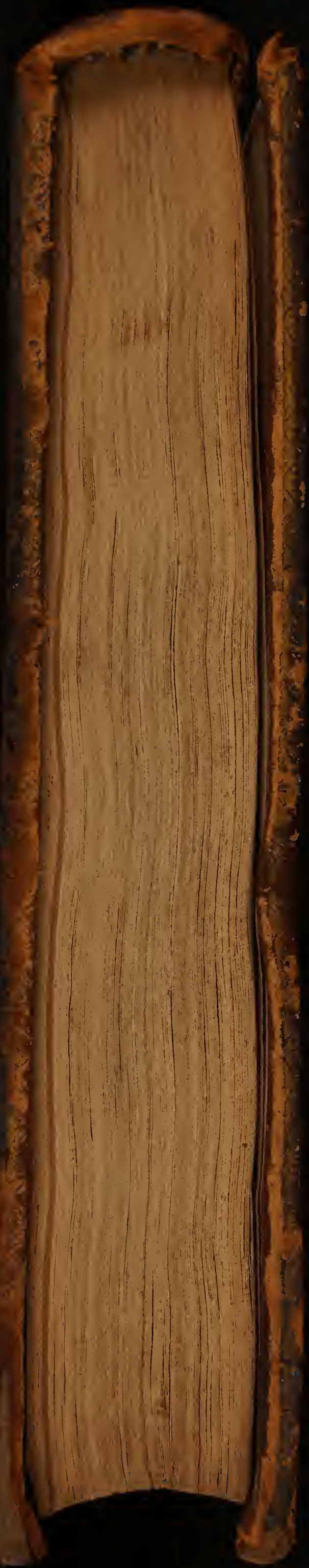
ATLAS
OF
SEWER





165316

85982

THE READING OF The Famous and Learned Robert Callis, Esq;

Upon the Statute of 23 *H.* 8. *cap.* 5.

OF

SEWERS:

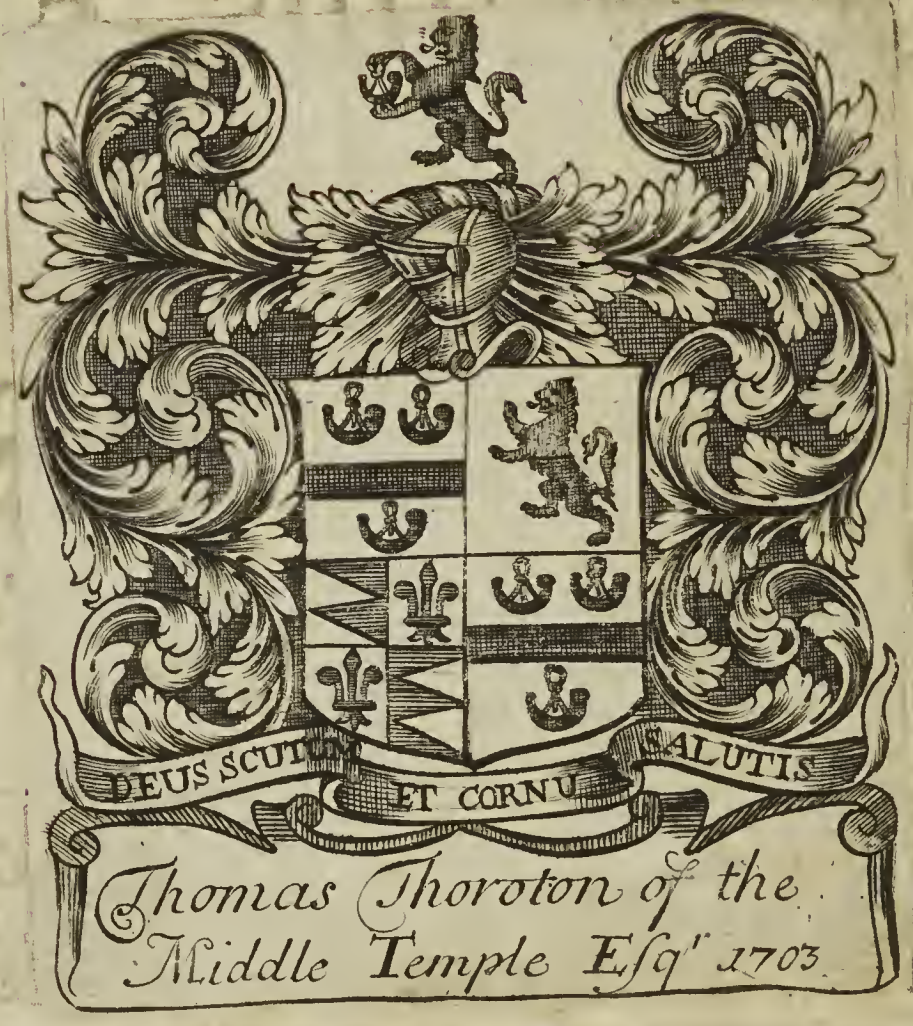
As it was delivered by him at *Gray's Inn*, in *August*, 1622.

The Second Edition, inlarged with the several Judgments and Resolutions of the Reverend JUDGES upon the Laws of Sewers, and other Remarks not before published.

With a New and Exact Table to the Whole.

Qui omnes tangit ab omnibus supportari debet.

LONDON,
Printed for *Tho. Basset*, at the George in *Fleet-street*,
and are to be sold by *William Canning* in *Vine Court*,
Middle-Temple. MDCLXXXVI.



Thomas Thoroton of the Middle Temple Esq^r 1703

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TO THE
READER.

THIS learned piece is ſo Well known, and hath already found ſo kind entertainment, that there will be little need to recommend it: The Laws of Sewers whereof it treats are of general concernment, as well to inland Counties through which Rivers run, as to maritime, and their uſe and importance is ſuch, as without the due execution of them, we ſhould be expoſed to the rage and violence of that mercileſs Element which ſurrounds us, Rivers would by Impediments and Annoyances be obſtructed in their courſes; Bridges, Calceys, Havens and Ports would fall to decay; in a word, the Gates which now open and let in commerce, and the Ways that convey and lead it through the Kingdom would fail us.

The Authour was a Gentleman of excellent parts, both natural and acquired, and had attained to great knowledge in the Laws of this Realm, which were his Profeſſion; And being for many years a Commiſſioner of Sewers in his native Countrey of Lincolnſhire, *which abounds in vaſt Fens and Mariſhes, he particularly applied himſelf to the ſtudy of theſe*

To the Reader.

Laws of Sewers, and made choice to read upon the Statute of 23 H. 8. cap. 5. *whereon that Commiſſion is principally grounded.*

Wherein how far he hath outgone all others who have written of that ſubject, with what judgment and politeneſs he hath handled as well ſeveral points at the Common-law, as the ſeveral branches of this Statute, and how he hath rendred the moſt dark, difficult and knotty parts thereof plain and intelligible, will eaſily appear to the diſcerning Reader.

That which is added in a larger letter, will it's hoped prove not unacceptable; Here and there is a touch upon ſome points controverted by our Authour; and the reſt gives you the Judgments and Reſolutions of the Reverend Judges upon the Laws of Sewers, ſome of them before his time, but not then made publick, and others ſince wherein care hath been taken that nothing ſhould be omitted that could be found pertinent to this ſubject.

However our Authour hath this right done him, that nothing is impoſed on him but what was his own, the Additions being ſufficiently diſtinguiſhed by the Character.

ERRATA.

PAge 57. l. 9. for *H.* 8. reade *H.* 4. Margent *ibid.* p. 76. l. 24. for *Ports*, r. *Parts.* p. 93. l. 22. for *repariæ*, r. *ripariæ.* p. 94. l. 30. for *contagious*, r. *outragious.* p. 104. l. 10. for *c.* 14. *c.* 18. l. 21. for *Calis*, r. *Callis.* p. 110. l. 23. for *is*, r. *if.* p.116. l. 14. r. *ought to be.* p.172. l. 7. for *decreed*, r. *denied.*

The

¶ *A general Act concerning Commissions of Sewers to be directed in all parts within this Realm.*

OUR Sovereign Lord the King, like a vertuous and moſt gracious Prince, nothing Earthly ſo highly weying as the advancing of the common profit, wealth and commodity of this his Realm, conſidering the daily great damages and loſſes which have happened in many and divers parts of this his ſaid Realm, as well by the reaſon of the outragious flowing ſurges and courſe of the Sea, in and upon marſh grounds and other low places heretofore through politick wiſedom won and made profitable for the great Common-wealth of this Realm, as alſo by occaſion of Land-waters and other outragious Springs, in and upon Meadows, Paſtures and other low Grounds adjoyning to Rivers, Flouds, and other Water-courſes. And over that, by and through Mills, Mill-dams, Weres, Fiſhgarths, Kedels, Gores, Gotes, Floudgates, Locks and other impediments, in and upon the ſame Rivers and other Water-courſes, to the ineſtimable damages of the Common-wealth of this Realm, which daily is likely more and more to encreaſe, unleſs ſpeedy redreſs and remedy be in this behalf ſhortly provided: wherein albeit that divers and many proviſions have been before this time made and ordained, yet none of them are ſufficient remedy for reformation of the Premiſſes: Hath therefore by deliberate advice and aſſent of his Lords Spiritual and Temporal, and alſo his loving Commons in this preſent Parliament aſſembled, ordained, eſtabliſhed and enacted, that Commiſſions of Sewers, and other the premiſſes ſhall be directed in all parts within this Realm from time to time, where and when need ſhall require according to the manner, form, tenor and effect hereafter enſuing, to ſuch ſub-

 ſtantial

23 H. 8. c. 5.

ſtantial and indifferent perſons as ſhall be named by the Lord Chancellor and Lord Treaſurer of England, and the two chief Juſtices for the time being, or by three of them, whereof the Lord Chancellor to be one.

The form of The Commiſſion of Sewers.

Henry the Eighth, &c. Know ye, that foraſmuch as the Walls, Ditches, Banks, Gutters, Sewers, Gotes, Calcies, Bridges, Streams, and other defences by the coaſts of the Sea, and marſh ground being and lying within the limits of A, B or C. in the County or Counties of or in the borders or confines of the ſame, by rage of the Sea, flowing and reflowing, and by mean of the trenches of freſh waters deſcending and having courſe by divers ways to the Sea, be ſo dirupt, lacerate and broken, and alſo the common paſſages of Ships, Balengers and Boats in the Rivers,

The ſeveral cauſes of awarding the Commiſſion of Sewers.

Streams, and other Flouds within the limits of A, B or C, in the County or Counties of or in the borders or confines of the ſame by mean of ſetting up, erecting and making of Streams, Mills, Bridges, Ponds, Fiſhgarths, Mill-dams, Locks, Hebbing-wears, Hecks and Floudgates, or other like lets, impediments, or annoyances, be letted or interrupted, ſo that great and ineſtimable damage for default of reparation of the ſaid Walls, Ditches, Banks, Fences, Sewers, Gotes, Gutters, Calcies, Bridges and Streams. And alſo by mean of ſetting up, erecting, making and inlarging of the ſaid Fiſhgarths, Mill-dams, Locks, Hebbing-wears, Hecks, Floudgates and other like annoyances in time paſt, hath happened, and yet is to be feared, that far greater hurt, loſs and damage is like to inſue, unleſs that ſpeedy remedy be provided in that behalf.

What things the Commiſſioners of Sewers are authoriſed to doe.

We therefore for that by reaſon of our dignity and prerogative royal we be bound to provide for the ſafety and preſervation of our Realm of England, willing that ſpeedy remedy be had in the Premiſſes, have aſſigned you and ſix of you, of the which we will that A, B and C ſhall be three to be our Juſtices to ſurvey the ſaid Walls, Streams, Ditches, Banks, Gutters, Sewers, Gotes, Calcies, Bridges, Trenches, Mills, Mill-dams, Floudgates, Ponds,

Ponds, Locks, Hebbing-wears, and other impediments, lets and annoyances aforeſaid, and the ſame cauſe to be made, corrected, repaired, amended, put down or reformed, as caſe ſhall require after your wiſedoms and diſcretions, and therein as well ordain and doe after the form, tenor and effect of all and ſingular the Statutes and Ordinances made before the firſt day of March, in the three and twentieth year of our Reign, touching the premiſſes, or any of them, as alſo to enquire by the oaths of the honeſt and lawfull men of the ſaid Shire or Shires, place or places, where ſuch defaults or annoyances be, as well within the Liberties as without (by whom the truth may the rather be known) through whoſe default the ſaid hurts and damages have happened, and who hath or holdeth, any Lands or Tenements, or common of paſture, or profit of fiſhing, or hath or may have any hurt, loſs or diſadvantage, by any manner of means in the ſaid places, as well near to the ſaid dangers, lets and impediments, as inhabiting or dwelling thereabouts by the ſaid Walls, Ditches, Banks, Gutters, Gotes, Sewers, Trenches and other the ſaid Impediments and Annoyances. And all thoſe perſons, and every of them to tax, aſſeſs, charge, diſtrain and puniſh, as well within the metes, limits and bounds of old time accuſtomed or otherwiſe, as elſewhere within our Realm of England, after the quantity of their Lands, Tenements and Rents, by the number of Acres and Pearches, after the rate of every Perſons Portion, Tenure or Profit, or after the quantity of their common of paſture, or profit of fiſhing, or other commodities there, by ſuch ways and means, and in ſuch manner and form, as to you or ſix of you, whereof the ſaid A, B and C to be three, ſhall ſeem moſt convenient to be ordained and done for redreſs and reformation to be had in the premiſſes: and alſo to reform, repair and amend the ſaid Walls, Ditches, Banks, Gutters, Sewers, Gotes, Calcies, Bridges, Streams, and other the premiſſes, in all places needfull: and the ſame as often, and where need ſhall be to make new, and to cleanſe and purge the Trenches, Sewers

Inquiry by whoſe defaults the annoyances come.

Aſſeſſing the perſons to be contributory to the charge.

and ditches in all places neceſſary. And farther, to reform, amend, proſtrate and overthrow all ſuch Mills, Streams, Ponds, Locks, Fiſhgarths, Hebbing-wears, and other impediments and annoyances aforeſaid, as ſhall be found by inquiſition, or by your ſurveying and diſcretions to be exceſſive or hurtfull. And alſo to depute and aſſign diligent, faithfull and true Keepers, Bailiffs, Surveyers, Collectors, Expenditors, and other Miniſters, and Officers for the ſafety, conſervation, reparation, reformation and making of the premiſſes, and every of them, and to hear the account of the Collectors and other Miniſters, of, and for the receit and laying out of the money that ſhall be levied and paid, in and about the making, repairing, reforming and amending of the ſaid Walls, Ditches, Banks, Gutters, Gotes, Sewers, Calcies, Bridges, Streams, Trenches, Mills, Ponds, Locks, Fiſhgarthes, Floudgates, and other impediments and annoyances aforeſaid. And to diſtrain for the arrearages of every ſuch collection, tax or aſſeſs, as often as ſhall be expedient, or otherwiſe to puniſh the debtors and deteinors of the ſame, by fines, amerciaments, pains, or other like means after your good diſcretions. And alſo to arreſt and take as many Carts, Horſes, Oxen, Beaſts, and other inſtruments neceſſary, and as many Workmen and Labourers, as for the ſaid works and reparation ſhall ſuffice, paying for the ſame competent wages, ſalary and ſtipend in that behalf: and alſo to take ſuch and as many Trees, Woods, Under-woods and Timber, and other neceſſaries, as for the ſame works and reparations ſhall be ſufficient at a reaſonable price by you or ſix of you, of the which we will that A, B and C ſhall be three to be aſſeſſed or limited as well within the limits and bounds aforeſaid, as in any other place within the ſaid County or Counties near unto the ſaid places: and to make and ordain Statutes, Ordinances, and proviſions from time to time, as the caſe ſhall require, for the ſafeguard, conſervation, redreſs, correction and reformation of the premiſſes, and of every of them, and the parts lying to the ſame neceſſary and behoovefull, after the laws and cuſtoms of

Appointing of Bailiffs, Collectors, Surveyors, and other inferior Officers.

Diſtraining for the arrearages of the money aſſeſſed.

Taking of Labourers, Workmen, Carriages, Timber, and other neceſſaries.

To make Statutes and Ordinances.

of Romney-marſh, in the County of Kent, or othewiſe, by any ways or means after your own wiſedoms and diſcretions. And to hear and determine all and ſingular the premiſſes, as well at our ſute, as at the ſute of any other whatſoever, complaining before you or ſix of you, whereof A, B and C ſhall be three after the laws and cuſtoms aforeſaid, or otherwiſe by any other ways and means after your diſcretions. And alſo to make and direct all writs, precepts, warrants, or other commandments by virtue of theſe preſents, to all Sheriffs, Bailiffs, and all other Miniſters, officers, and other perſons, as well within liberties as without, before you or ſix of you, whereof the ſaid A, B and C to be three, at certain days, terms, and places to be prefixed, to be returned and received. And farther to continue the proceſs of the ſame, and finally to doe all and every thing and things, as ſhall be requiſite for the due execution of the premiſſes, by all ways and means after your diſcretions. And therefore we command you that at certain days and places, when and where you, or ſix of you, whereof the ſaid A, B and C to be three, ſhall think expedient, ye do ſurvey the ſaid walls, fences, ditches, banks, gutters, gotes, ſewers, calcies, ponds, bridges, rivers, ſtreams, water-courſes, mills, locks, trenches, fiſhgarths, floudgates, and other the lets, impediments, and annoyances aforeſaid, and accompliſh, fulfill, hear and determine all and ſingular the premiſſes in due form, and to the effect aforeſaid, after your good diſcretions: and all ſuch as ye ſhall find negligent, gainſaying, or rebelling in the ſaid works, reparations or reformation of the premiſſes, or negligent in the due execution of this our commiſſion, that ye do compell them by diſtreſs, fines and amerciaments, or by other puniſhments, ways or means, which to you or ſix of you, whereof the ſaid A, B and C ſhall be three, ſhall ſeem moſt expedient for the ſpeedy remedy, redreſs and reformation of the premiſſes, and due execution of the ſame. And all ſuch things as by you ſhall be made and ordained in this behalf, as well within liberties as without, that ye do cauſe the ſame firmly to be obſerved,

Awarding of Writs and Precepts to Sheriffs, Bailiffs, and others.

To compell others to obey their orders.

doing

doing therein as to our Juſtices appertaineth, after the Laws and Statutes of this our Realm, and according to your wiſedoms and diſcretions. Saved always to us ſuch fines and amerciaments as to us thereof ſhall belong. And we alſo command our Sheriff or Sheriffs of our ſaid County or Counties of that they ſhall cauſe to come before you or ſix of you, of the which A, B and C ſhall be three, at ſuch days and places as ye ſhall appoint to them, ſuch and as many honeſt men of his or their Bayliwick, as well within the liberties as without, by whom the truth may beſt be known, to inquire of the premiſſes; Commanding alſo all other Miniſters and Officers, as well within Liberties as without, that they and every of them ſhall be attendant to you in and about the due execution of this our Commiſſion. In witneſs whereof we have cauſed theſe our Letters patents to be made. Witneſs our ſelf at Weſtminſter the day of in the year of our Reign.

A commandment to the Sheriffs to return before the Commiſſioners ſuch Jurors as ſhall be expedient for inquiry.

All other Officers ſhall be attendant unto the Commiſſioners.

And it is alſo enacted, that every ſuch perſon as ſhall be named Commiſſioner in the ſaid Commiſſion, after he hath knowledge thereof, ſhall effectually put his diligence and attendance in and about the execution of the ſaid Commiſſion. And before he ſhall take upon him the execution of the ſaid Commiſſion, he ſhall take a corporal oath before the Lord Chancellour, or before ſuch to whom the ſaid Lord Chancellour ſhall direct the King's Writ of Dedimus poteſtatem, to take the ſame, or before the Juſtices of the Peace in the quarter Seſſions holden in the Shire where ſuch Commiſſion ſhall be directed: the tenor of which oath hereafter enſueth.

The Commiſſioners ſhall take an oath.

¶ Ye ſhall ſwear that you to your cunning, wit and power ſhall truly and indifferently execute the authority to you given by this Commiſſion of Sewers, without any favour, affection, corruption, dread or malice to be born to any manner of perſon or perſons: and as the caſe ſhall require, ye ſhall conſent and endevor your ſelf for your part to the beſt of your knowledge and power to the making of ſuch wholſome, juſt, equal and indifferent laws and ordinances,

The Oath of the Commiſſioners for Sewers.

dinances, as ſhall be made and deviſed by the moſt diſcreet and indifferent number of your fellows being in Commiſſion with you for the due redreſs, reformation, and amendment of all and every ſuch things, as are contained and ſpecified in the ſaid Commiſſion: and the ſame laws and ordinances to your cunning, wit and power cauſe to be put in due execution, without favour, meed, dread, malice or affection, as God you help and all Saints.

A confirmation of other Statutes.

And it is alſo enacted by the authority aforeſaid, that all and every Statute, Act and Ordinance heretofore made concerning the premiſſes, or any of them, as well in the time of our Sovereign Lord the King, that now is, as in the time of any of his progenitors Kings of this Realm of England, not being contrary to this preſent Act, nor heretofore repelled, from henceforth ſhall ſtand and be good and effectual for ever, and to be put in due execution according to the true meaning and purport of the ſame.

The authority of the Commiſſioners.

And over that be it enacted, that the Commiſſioners hereafter to be named in any of the ſaid Commiſſions according to the purport and effect of the ſame Commiſſions, have full power and authority to make, conſtitute, and ordain laws, ordinances and decrees, and farther to doe all and every thing mentioned in the ſaid Commiſſion according to the purport, effect, words and true meaning of the ſame: and the ſame Laws and Ordinances ſo made, to reform, repell and amend, and make new from time to time, as the caſes neceſſary ſhall require in that behalf.

The power of the Commiſſioners in caſe of refuſal to pay.

Provided always, and it is enacted, that if any perſon or perſons being aſſeſſed or taxed to any lot or charge, for any Lands, Tenements or Hereditaments, within the limits of any Commiſſion hereafter to be directed, do not pay the ſaid lot and charge according to the Ordinance and aſſignment of the Commiſſioners, having power of the execution of the ſaid Commiſſion: by reaſon whereof it ſhall happen the ſaid Commiſſioners having

having power of execution of such Commission, for lack of payment of such lot and charge to decree and ordain the same Lands, Tenements and Hereditaments from the owner or owners thereof, and their Heirs, and the Heirs of every of them, to any person or persons for term of years, term of life, in fee simple or in taile for payment of the same lot and charge, that then every such Decree and Ordinance so by them made and ingrossed in parchment, and certified under their Seals into the King's Court of Chancery, with the King's royal assent had to the same, shall bind all and every person and persons, that at the making of the same Decree had any interest in such Lands, Tenements or Hereditaments in use, possession, reversion or remainder, their Heirs and Feoffees, and every of them, and not to be in any wise reformed, unless it be by authority of Parliament hereafter to be summoned and holden within this Realm.

Decree.

The Commissioners Decree shall bind the King's, and all other mens Lands.

And also it is provided by authority aforesaid, that the same Laws, Ordinances and Decrees to be made and ordained by the said Commissoners or six of them by authority of the said Commission shall bind as well the lands, tenements and hereditaments of the King our Sovereign Lord, as all and every other person and persons and their heirs for such their interest as they shall fortune to have, or may have in any Lands, Tenements or Hereditaments, or other casual profit, advantage or commodity whatsoever they be, whereunto the said Laws, Ordinances and Decrees shall in any wise extend, according to the true purport, meaning and intent of the same Laws.

No man may sit being unsworn.

And it is furthermore by the authority aforesaid established and enacted, that if any manner of person or persons of what estate or degree soever he or they be of, that from henceforth doth take upon him or them to sit by virtue of any of the said Commissions, not being before sworn in form as is aforesaid, and according to the tenor of the oath before specified. Or if any person so named

named and ſworn do ſit, as is aforeſaid, not having Lands and Tenements, or other hereditaments in fee ſimple, fee tail or for term of life, to the clear yearly value of forty marks above all charges to his own uſe, except he be reſiant and free of any City, Borough or Town Corporat, and have moveable ſubſtance of the clear value of one hundred pounds, or elſe be learned in the laws of this Realm in and concerning the ſame, that is to ſay, admitted in one of the four principal Inns of Court for an utter barreſter, ſhall forfeit forty pounds for every time that he ſhall attempt ſo to doe; the one half thereof to be to our Sovereign Lord the King, and the other half thereof to the uſe of him or them that will ſue therefore, by action of debt, bill, plaint or information in any of the King's Courts: in which action or ſute no wager of law ſhall be admitted, nor any eſſoin or protection ſhall be allowed. And if any action of treſpaſs or other ſuit ſhall happen to be attempted againſt any perſon or perſons for taking of any diſtreſs, or any other Act doing by authority of the commiſſion, or by authority of any Laws or Ordinances made by vertue of the ſaid commiſſion, the defendant or defendants in any ſuch action ſhall and may make avowry, cognizance or juſtification for the taking of the ſame diſtreſs or other Act doing; touching the premiſſes, or any of them, alledging in ſuch advowry, cognizance or juſtification, that the ſaid diſtreſs, treſpaſs or other Act, whereof the plaintiff complaineth, was done by authority of the commiſſion of ſewers for lot or tax aſſeſſed by the ſaid commiſſion, or for ſuch other act or cauſe, as the ſaid defendant did by authority of the ſame commiſſion, and according to the tenor, purport and effect of this preſent Act made the xxiii. year of the reign of our Sovereign Lord King Henry the eighth, without any expreſſing or rehearſal of any other matter or circumſtance conteined in this preſent Act, or any Commiſſion, Laws, Statutes, or Ordinances thereupon to be made,

What Land each Commiſſioner ſhall have.

Utter barreſt.

Avowry, or juſtification of a diſtreſs taken by reaſon of the Commiſſion of Sewers.

whereupon the plaintiff shall be admitted to reply, that the defendant did take the said distress or doe any other act or trespass supposed in his declaration of his own wrong, without any such cause alledged by the said Defendant, whereupon the issue in every such action shall be joyned to be tryed by verdict of twelve men, and not otherwise, as is accustomed in other personal actions. And upon the trial of that issue the whole matter to be given on both parties in evidence according to the very truth of the same. And after such issue tried for the Defendant or nonsuit of the Plaintiff after appearance, the same Defendant to recover treble damages by reason of his wrongfull vexation in that behalf, with his costs also in that part sustained, and that to be assessed by the same Jury or Writ to inquire of damages, as the cause shall require.

Issue.

Where the Defendant shall recover damages, with his costs of suit.

And it is also enacted, that every of the said Commissioners shall have and perceive four shillings for every day that they shall take pains in the execution of this Commission of Sewers, and one Clerk by them to be assigned two shillings for every day, of the rates, taxes, lots and waines that shall be assessed or lost by authority of the said Commission, and to be levied and paid by their discretions. And that the said Commissioners, or six of them shall have power and authority to limit and assign of the same rates, taxes, lots and waines by their discretions such reasonable sums of money to the said Clerk for writing of books and process concerning the premisses, and to the collectors, expenditors, and such other as shall take pains in due execution of the said Commission, as by the discretions of the said Commissioners, or six of them, shall be thought reasonable.

Wages for Commissioners, Clerks, Collectors, &c.

Provided always, that whensoever, and as often as such Commission, as is afore limited, shall be made and directed to any person or persons for the reformation and amendment, of or in any of the premisses specified

Commissions within the liberty of the Duchy.

in

in the ſaid Commiſſion, within the fees, liberty or poſſeſſion of the duchy of Lancaſter, that then ſuch Commiſſioners as ſhall execute any ſuch Commiſſion ſhall be always named and appointed, by the diſcretion of the Lord Chancellour and Lord Treaſurer of England, and the ſaid two chief Juſtices of either Bench, and the Chancellour of the ſaid duchy for the time being, or three of them, whereof the ſaid Lord Chancellour and the Chancellour of the duchy to be two. And that in every ſuch caſe two Commiſſions ſhall be awarded, and made according to the tenor of the Commiſſion above expreſſed, one thereof under the great Seal of England, and the other under the Seal of the ſame duchy, as before time hath been accuſtomed, any thing afore rehearſed in this preſent Act to the contrary hereof notwithſtanding. Lancaſter.

And it is further enacted, that the ſaid Commiſſions from time to time, as the caſe ſhall require, ſhall be had and obtained without any money or other charge to be payed for the Seals or writing of the ſame, unleſs it be to the King two ſhillings ſix pence for the Seal of every Commiſſion, as hath been accuſtomed, and for the writing and inrolling of any one Commiſſion 6. s. and not above. Charge of the Commiſſion.

And it is further enacted, that every Commiſſion to be made by authority of this Act, ſhall indure and continue for the term of three years next after the Teſte of the Commiſſion. Nevertheleſs, after any Commiſſion made and delivered out of the King's Court of Chancery, the King's highneſs ſhall always at his pleaſure, by his writ of Superſedeas, out of his ſaid Court of Chancery, at any time diſcharge as well every ſuch Commiſſion as every Commiſſioner that ſhall be made or named by authority of this Act. A Commiſſion of Sewers ſhall indure three years. Superſedeas.

After which diſcharge the ſaid Commiſſioners ſhall have no power nor authority to proceed in the execution of their Commiſſion, nor in any thing by authority of this Act.

How long the Commissioners Decrees shall stand good.

Provided always, that such Laws, Acts, Decrees, and Ordinances, as shall happen to be made by the said Commissioners according to the tenor of their Commission, or by authority of this Act, shall stand good and effectual, and be put in due execution so long time as their Commission endureth and no longer: except the said Laws and Ordinances be made and ingrossed in Parchment, and certified under the Seals of the said Commissioners into the King's Court of Chancery, and then the King's royal assent be had to the same: any thing contained in this present Act to the contrary hereof notwithstanding.

Commissions into Wales, or a County Palatine.

Wales. Chester.

Provided also, that whensoever, and as often as such Commission, as is afore limited, shall be made and directed to any person or persons for the reformation and amendment of or in any of the premisses specified in the said Commission, within the fees, liberties and possessions of the principality of Wales, the County Palatine of Chester, or within the fees, liberties and possessions of any other place, where there is liberty and jurisdiction of County Palatine, that in every such case two Commissions shall be awarded, and made according to the tenor of the Commission above expressed, one thereof under the great Seal of England, and the other under the usual Seal of the County Palatine, in manner and form, as is above provided for the Duchy of Lancaster, any thing afore rehearsed in this present Act to the contrary notwithstanding.

The King's Royal assent shall be certified into the Chancery.

And it is provided and also enacted, that the royal assent limited to be had unto the Laws and Ordinances to be made by the said Commissioners, as is above said, shall be certified into the said Court of Chancery under the Kings privy Seal: and that there shall not any sum of money be paid for the said privy Seal, but for the writing of the same Certificate under the said privy Seal shall be paid to the writer thereof ii. s. and not above, nor no other, nor greater sum for any thing touching

or concerning the same certificate under the same privy Seal.

Provided always, that the Chancellours, and such other as shall have the custody of the Seals of the said principality of Wales, or the County Palatine of Chester, or within the fees, liberties and possessions of any other place, where there is liberty and jurisdiction of County Palatine, upon reasonable request, and upon the sight of the Commission under the King's great Seal of his Chancery, shall without delay make out another Commmission under the Seal of the said County Palatine according to the tenor of the King's Commission to them shewed under his great Seal. And to those Commissioners as shall be named by the Lord Chancellour, Lord Treasurer, and the two chief Justices, or by three of them, whereof the Lord Chancellour, to be one, except it be within the fees and liberties of the Duchy of Lancaster, within which fees and liberties the Commissioners shall be named, and Commissions made, as is afore ordained by this Act: any thing contained in the said Act, or in any proviso thereunto added and annexed to the contrary thereof notwithstanding. This Act to endure for twenty years. Stat. 3 E. 6. 8. made perpetual.

¶ *An*

¶ *An Act concerning the Oath of Commissioners of Sewers.*

25 H.8. c.10. BE it enacted by the authority of this present Parliament: That the Act late made for sewers, and the Commission therein recited, shall be extended, used, and put in execution in the Town and the Marches of Callis, according to the tenour of the same Commission in like effect as it is enacted to be put in execution within this Realm, and that no person shall be compelled to be sworn or otherwise bound to sit or travel in execution of any Commission of Sewers within this Realm, unless that he be dwelling within the County whereof he is or shall be assigned to be a Commissioner, and for Callis and the said Marches thereof, unless that he be dwelling within the same Town of Callis, or Marches.

Callis.

Commissioners of Sewers dwelling in the same County.

¶ And because that divers persons heretofore assigned to be Commissioners have refused to be sworn, according to the said former Act, whereby divers Commissions heretofore made, remain hitherto without effectual execution: Be it therefore enacted, that if any person assigned or to be assigned, to be such Commissioner of Sewers, being required hereafter by such person or persons as have or shall have authority by the King's writ, or otherwise, to receive or accept the oath comprised in the said former Act, every person that so refuseth to take the same oath, or upon that request made, do not receive the same oath, and that refusal or contempt done in the Chancery, or returned into the Chancery with the said writ, shall loose and forfeit for the same contempt to the King our sovereign Lord, five marks, and so to loose from time to time five marks for every such contempt, as shall be done or returned into the said Chancery against any such persons, unless that he in the same

The forfeiture of a Commissioner of Sewers who refuseth to take the Oath appointed by the Statute of 23 H. 8. 5.

ſame Chancery do ſhew and alledge, in the ſaid term, wherein ſuch return ſhall be made againſt him, ſufficient and reaſonable matter and cauſe to be allowed by the Lord Chancellour for his excuſe and diſcharge in that behalf.

¶ *An Act for the continuance of the Statute of Sewers.*

WHere in the Parliament holden at Weſtminſter, by prorogation the fifteenth day of *January*, in the three and twentieth year of the moſt victorious reign of our late Sovereign Lord King *Henry* the VIII. among other things, one general Act concerning Commiſſions of Sewers, to be directed into all parts within this Realm, was enacted and made to continue and endure for twenty years then next following, as by the ſame Act more at large it doth and may appear: and for as much as the ſame Act is thought good and beneficial for the Commonwealth of this Realm, Be it therefore enacted and ordained by the King our Sovereign Lord, with the aſſent of the Lords ſpiritual and temporal, and the Commons in this preſent Parliament aſſembled, and by the authority of the ſame, that the ſaid Act, and all clauſes, articles, and proviſions, in the ſame contained, ſhall continue and indure in their force and ſtrength, and to be obſerved and kept for ever, in ſuch manner and form, as ſhall and may ſtand with the ſequels and additions hereafter mentioned.

3 & 4 Ed. 6. cap. 8. The Statute of 23 H. 8. 5. touching the Commiſſion of Sewers made perpetual.

And be it further enacted and eſtabliſhed by the authority aforeſaid, that all ſcots, lots, and ſums of money hereafter to be rated, and taxed, by vertue of ſuch Commiſſion of Sewers, upon any the Lands, Tenements, or Hereditaments of our Sovereign Lord the

All ſums of money taxed by force of the Commiſſion of Sewers upon any of the King's

Lands shall be leviable by distress.

the King, his Heirs or Successors, for any manner of thing or things, concerning the Articles of the said Commission of Sewers, shall be gathered and levied by distress, or otherwise, in like manner and form as shall or may be done in the Lands, Tenements and Hereditaments of any other person or persons, and that all bills of acquittance, signed with the hand or hands of such Collector or Receiver, as shall have the collection thereof by the appointment of the said Commissioners, or six of them, shall be as well a sufficient discharge, to the Tenants, Farmers, and Occupiers of the same Grounds, so to be charged for the said sum, wherewith their Grounds shall be so charged, as also a sufficient warrant to all and every the receivers, auditors, and other whatsoever officer or officers of our said Sovereign Lord the King, his Heirs and Successors, for the allowance to such Tenant, Farmer, or Occupier for the same: Adding moreover unto this Act, by the authority of this present Parliament, that such, and like fees, and none other, nor more, shall be at any time paid or demanded, for any commission, or commissions, or writs of Dedimus potestatem, hereafter to be sued out, or obtained under the seal of the Duchy, but onely such, and like fees as be mentioned in the said former Act, to be paid in the Chancery, for Commissions and Writs of Dedimus potestatem, to be obtained from the same Court of Chancery. Adding moreover thereunto by the authority aforesaid that every Commission and Commissions, hereafter to be awarded for Sewers, shall continue and endure for term of five years, next after the Teste of such Commission, unless the same Commission and Commissions, shall be otherwise discharged, within the same by Supersedeas, any thing or things mentioned or contained in the said former Act, contrary to the additions before mentioned, or any of them, in any wise notwithstanding.

What fees shall be paid for the Commission of Sewers sued out under the Seal of the Duchy.

How long the Commission of Sewers shall endure.

¶ *An*

¶ *An Act for the Commiſſion of Sewers.*

FOraſmuch as no Commiſſion of Sewers, by the Statutes heretofore made, may have continuance above the ſpace of five years: Be it therefore enacted by the Queen's moſt excellent Majeſty, with the aſſent of the Lords ſpiritual and temporal, and the Commons in this preſent Parliament aſſembled, and by the authority of the ſame, that from henceforth all and every Commiſſion and Commiſſions of Sewers, now ſtanding in force, or that hereafter ſhall be granted and made, ſhall ſtand and continue in force for the term of ten years, next inſuing the date of every ſuch Commiſſion, unleſs the ſame Commiſſion or Commiſſions be, or hereafter ſhall be repealed, or determined, by reaſon of any new Commiſſion in that behalf made, or by ſuperſedeas: and that all ſuch Laws, Ordinances and Conſtitutions as be, or ſhall be duly made by force of any ſuch Commiſſion, according to the tenour and effect limited in any former Statute heretofore made, touching Commiſſion or Commiſſions of Sewers, and being written in Parchment indented, and under the Seals of the ſaid Commiſſioners, or ſix of them, whereof the one part ſhall remain with the Clerk appointed, and to be appointed for the Commiſſion of Sewers for the time being, and the other part in ſuch place as the ſame Commiſſioners, or ſix of them, ſhall order and appoint: ſhall without any Certificate thereof to be made into the Court of Chancery, and without the Royal aſſent to the ſame had, ſtand and continue in full force and effect, notwithſtanding any determination of any ſuch commiſſion by ſuperſedeas, untill ſuch time as the ſame Laws, Conſtitutions and Ordinances ſhall be altered, repealed, or made void, by the Commiſſioners after to be aſſigned and appointed for Sewers, in thoſe

13 Eliz. c. 9.

A Commiſſion of Sewers ſhall continue ten years.

The Orders of Commiſſioners of Sewers ſhall be of force without the Certificate of them, or the Royal Aſſent.

parts, where the ſame Laws, Ordinances and Conſtitutions were made, ordained and conſtituted, or by ſix of them.

The Commiſſioners of Sewers Orders ſhall continue, though the Commiſſion do expire.

And be it farther enacted by the authority aforeſaid, that at all times from and after the end and expiration of the term of ten years, next inſuing the date or teſte of any commiſſion of Sewers hereafter to be made, all ſuch Laws, Ordinances and Conſtitutions, as were made by virtue of any ſuch Commiſſion, and written in parchment, indented and ſealed, as is above-mentioned, without certificate thereof, or the aſſent royal to the ſame had as is aforeſaid, ſhall notwithſtanding the determination of any ſuch Commiſſion by the expiration of the term of ten years next inſuing the date of any ſuch Commiſſion of Sewers, likewiſe continue in force, for and by the ſpace of one whole year then next inſuing: and that the Juſtices of Peace of the Shire and Shires where the ſame Laws, Ordinances and Conſtitutions are to be executed within their ſeveral commiſſions and limits, or ſix of them, whereof two to be of the Quorum, ſhall have power and authority, by the ſpace of one whole year next after the expiration of every ſuch Commiſſion, to execute the ſame Laws, Ordinances and Conſtitutions, and every of them, as fully, and in as ample manner and form, as the Commiſſioners or any of them named and appointed in every or any Commiſſion ſo expired might or ſhould have done, to all intents and purpoſes, as if the ſaid Commiſſion or Commiſſions had continued in force.

The Juſtices of Peace may for one year execute the Commiſſion of Sewers, unleſs a new Commiſſion be granted.

Provided always, and be it nevertheleſs enacted, that if any new Commiſſion of Sewers ſhall be made within the ſaid year, that then immediately from and after ſuch Commiſſion newly made and publiſhed, the power of the ſaid Juſtices of the Peace, and every of them, in any-wiſe concerning the execution of any ſuch Laws, Ordinances, and Conſtitutions of Sewers, ſhall utterly ceaſe: Any thing or things in this Act to the

the contrary expressed in any wise notwithstanding.

And be it farther enacted, that no Farmer or Farmers, for term of years, of any Manors, Lands, or Tenements, lying or being within the Precincts or Limits of any such Commission of Sewers, which be, or hereafter may be ordered and chargeable by any Laws, Ordinances, or Constitutions, made or to be made by virtue of any such Commission, wherein he or they shall be named or appointed Commissioner or Commissioners, not having Estate of Freehold within the Realm of England, of, or in Manors, Lands, or Tenements, of the yearly value of forty pounds, shall at any time hereafter, have power to sit, or in any wise intermeddle with the execution of such Commission or Commissions, during the time he or they shall continue, or be such Farmer or Farmers of any such Manors, Lands or Tenements, and shall not have Estate of Freehold, as is aforesaid: but that every such Commission, as having respect onely to every such person or persons, for such and so long time as he or they shall so be and continue Farmer or Farmers of any such Manors, Lands or Tenements, shall be deemed and adjudged in Law to be void, and of none effect: Any thing in the same Commission, or any Statute or Law heretofore made to the contrary notwithstanding.

A Farmer of Lands chargeable shall not be Commissioner within the same Precinct.

And be it farther enacted by the Authority aforesaid, that from henceforth the said Commissioners, nor any of them, shall not be compelled, nor compellable to make any Certificate or return of the said Commissions, or any of them, or of any their Ordinances, Laws or doings, by the authority of any the said Commissions, nor shall not have any fine, pein, or amerciament set upon them, or any of them, or any ways to be molested in Body, Lands, or Goods, for that cause.

There shall be no Certificate or return of the Commission.

And yet nevertheless, to the intent the Queen's Majesty our Sovereign Lady, her Heirs and Successours, may be at all times hereafter truly answered of all such Issues,

Fines, and Amerciaments, as ſhall happen, grow, or be forfeited by virtue of any ſuch Commiſſion, or by the execution thereof: Be it alſo enacted, that the Clerk and Clerks appointed, and hereafter to be appointed, for and in any ſuch Commiſſion, or Commiſſions of Sewers, ſhall yearly truly eſtreat all the ſaid Iſſues, Fines, Penalties, Forfeitures and Amerciaments, that ſhall be due and answerable to her Highneſs, her Heirs and Succeſſours, and the ſame Eſtreats ſhall yearly deliver into the Court of the Exchequer, at ſuch time and times, and in ſuch manner and form, as Juſtices aſſigned to and for the conſervation of the Peace in any wiſe ſhould or ought to doe by virtue of their Commiſſion, upon pein to forfeit to our Sovereign Lady the Quéen, her Heirs and Succeſſours, for every default in that behalf made, five pounds.

The Fines and Amerciaments ſhall be eſtreated into the Exchequer.

Provided always, that it ſhall be lawfull for any Commiſſioner, being alſo a Farmer, and not having Lands and Tenements, to the clear yearly value of forty pounds of Fréehold, to ſit by virtue of the ſaid Commiſſion, and have his voice and full authority with others to make and eſtabliſh Ordinances for Sewers, according to the tenour of the Commiſſion touching and concerning all Lands and Tenements within the precinct of every ſuch Commiſſion, other than ſuch Lands and Tenements as he or they, for the time being, hold and injoy as Farmer, as he or they might have done before the making of this Statute: Any thing therein contained to the contrary notwithſtanding.

In what caſe a Farmer of Lands chargeable may be a Commiſſioner.

Lectura

Lectura Prima.

MY moſt worthy Fellows and Companions of this noble and renowned Society, the Hourglaſs of my puiſne time is run, and I am now come to take poſſeſſion of your Reader's place; wherein I muſt hazard to your cenſures the fortunes of my inability: Theſe twenty and ſix years compleat I have had continuance here, and in that time I have onely taken the meaſure and length of your Hall: And herein I acknowledge *Grays-Inn* to be the Patron of my beſt fortunes, and your ſelves the beſt Companions of my forepaſt and preſent life. I made a queſtion, when it came to my turn to reade, whether I ſhould turn therefrom or not, being then troubled about Two things, *Charge* and *Care*, both which I put into a pair of Scales, wherein I thought *Charge* weighed heavy and ſolid (for *ibi ponebantur ſolidi*) *Care* notwithſtanding had his equal weight with the other, and poiſed the Scales even: Yet I conſidered the ſmall Subſtance I had got came by my Profeſſion, I therefore took my ſelf both in Credit and Conſcience bound to undertake this burthenſome place, for the maintenance and preſervation of the honour of this Houſe; and with that I put *Charge* and *Care* in one Scale, and *Reſolution* in the other, which ſcaled them both up. Twenty years likewiſe of my laſt paſt time, I have in the practice of my Profeſſion ſpent, but, I hope, little conſumed thereof; In which time I lanched forth my Ship (*In profundum Maris*) for a Voyage to the Sea, and now ſhe is returned to your Shores, furniſh'd and balliſt with Merchandize of ſeveral eſtimates: By my Ship I mean my Statute which I reade on, which be the Laws of

Shewers;

Sewers; the Merchandize be the weighty matters therein contained: By the Governours and Rulers of this Ship, I mean the grave and prudent Commiſſioners who are put in charge and truſt with the execution of theſe Laws: By the Mariners, I intend the Officers of this Law; the Merchants place I reſerve unto my ſelf: The Wares brought home be of divers ſorts, ſome onely fit for the Imperial Majeſty of a King, and theſe be Royal Prerogatives, ſhewing forth their ſplendour like the *Flower de Luce* in the Crown; others belong to high Nobility, and ſome be uſefull for the homely Commonalty; the reſt which ſhall remain, I have caſt under Hatches for my laſt days Mart, when I mean to make chaffer on them all. But though I ſeem to make theſe Markets of my Legal Merchandize, yet I do not mean to ſet ſuch Rates upon them as Merchants uſe to do, which be all for *(utile dulce)* for I onely ſet one price upon all, which is your kind acceptance. Marvell not, I pray you, at theſe my Sea-like ſalutations, for this day I am become God *Neptune*'s Oratour, and I mean to diſplay the power of his Empire; for my Statute, my Caſes, and my Argument, will all depend upon the Element of Water, over which, as Poets feign, *Neptune* hath chief predominance. Well, now my Ship is at ſhore, and I have caſt Anchor there, and to my great comfort I ſee many Chapmen attending the Market, and therefore now preſently I will unlock, and ſet open the Cloſet of my Store, which be contained in the fair Volumns of the Law, and eſpecially in that Law made and enacted in the Parliament held in the 23*d* year of *Hen.* the 8*th*, cap. 5. which is *A general Act concerning the Commiſſioners of Sewers for all the Realm of* England.

The cauſes wherefore I made choice to reade upon this Law, be five in number; *Viz.*

1. *Firſt*, For the Antiquity of theſe Laws of Sewers, though this Statute bear date but 23 *H.* 8.

Secondly,

Secondly, For the largity and extent thereof, which appears in the ſtyle of this Statute, and there termed, *A general Act for all the Realm of* England. 2.

Thirdly, For the neceſſary uſe thereof, which continual practice and daily experience teacheth us. 3.

Fourthly, I have had a more deſire to reade upon theſe Laws, becauſe never any Reader did heretofore undertake the ſame; and upon peruſal of this Statute, and upon due conſideration taken of others, I thought I could not make my choice of a more fitting, and more neceſſary Law, nor more profitable for my Native Countrey of *Lincolnſhire*, and other Maritime Places of this Kingdom, than this is. 4.

And *Fifthly*, His Majeſty's general care, which theſe Laws require at his hands, and his ſpecial care, by the which his Highneſs of late hath taken theſe Laws into his gracious and provident protection. 5.

And upon due conſideration taken of all theſe Caſes, I reſolved to proceed in the expoſition of this Statute, being made perpetual by the Statute of 3 *Ed.* 6. *cap.* 8.

And to ſpeak ſomething of the three firſt cauſes, I am of opinion for the Reaſons and Authorities enſuing, That the Laws of Sewers have been, and be of great antiquity, and have told over as much time, and as many years as any other Laws of this Realm have done: For as Mr. *Cambden* in his *Britannia* ſaith, *Quod inſula Britannia avida in mare omni ex parte ſe projecit*; Therefore this Realm adjoining on every ſide upon the Sea, could not be ſafe without thoſe provident Laws made and uſed for the defence thereof. Antiquity of theſe Laws. *Cambden.*

And although it is ſaid in Scripture, That Almighty God hath bound the Seas by the word of his Commandment, and had ſhut up the Deep, and ſealed it with his terrible and glorious Name; yet God, who beſtowed wiſedom on man, it was his pleaſure he ſhould providently uſe it over the reſt of the Creatures, not giving way that he In *Manaſſes* Prayer King of *Judah.*

he ſhould be remiſs or preſumptuous in any thing, which by his foreſight or judgment might be prevented, helped and relieved.

Geneſis, c. 7. It is true, that at the Floud, *Cum cataracta Cœli fuerint operta*, when the Windows of Heaven were by God's determinate will ſet open, and that the Seas did *Suum excedere modum*, no power of man's hand could ſtay the ſwallowing and devouring ſurges of the Seas and Waters; yet then notwithſtanding had God appointed that his Servant *Noah* and his Children, and ſuch Creatures as he appointed, ſhould be preſerved by the Ark, which was a work of their own hands; Therefore the Laws of God and Nature have appointed man to make proviſion for the neceſſary defence and ſafety of himſelf, and of his Countrey; And the Laws of this Realm, moſt of which have received their *primam eſſentiam* from the Divine Laws of the Almighty, and have fetched their Pedigree from the Law of Nature, have *à principio* been ſo predominant in this Kingdom of *England*, that they have never been wanting at any time to provide for the ſafety thereof.

And if the Regiſter be ſo ancient a Book as Sir *Eward Cook* in one of his Epiſtles hath there declared it to be, then it may give ſatisfaction in this kind, that theſe Laws of Sewers were in thoſe times of great eminency and authority; For there I find two ſeveral Writs or Commiſſions of that nature, The one authorizing certain Perſons to ſurvey the defences in the Parts of *Holland* in the County of *Lincoln*; The other for the viewing and ſurveying of the ſurrounded Grounds lying between the two Rivers *Humber* and *Auckholin* in the ſaid County of *Lincoln*; And the firſt of the ſaid Commiſſions is ſet down *verbatim* in *Fitz. nat. bre. fo.* 113. Yet the firſt Statute which appears to us in print, wherein the frame of a Commiſſion of Sewers is ſet down, is the Statute of 6 *H.* 6. *cap.* 5. Yet I make no queſtion but the ſaid Commiſſions expreſſed in the Regiſter, and *Fitz. na. bre.* were in their forms long before *Henry* the Sixth's time; and that the Statute of *Henry* the Sixth

Regiſter in *Oyer* and *Terminer.*

Fitz. nat. bre. fol. 113.

6 *H.* 6. *c.* 5.

Sixth adds ſome more power and ſtrength thereto than was before, having backt them with the power of the Parliament; and it is ſomething additional in matter, as it was in power, as by both the Commiſſions compared together is apparent.

I do likewiſe find in the 38*th* of *Edward* the Third, *Lib. Aſſ. plac.* 15. That a Commiſſion was awarded to inquire of Bridges, and of the repairs thereof, which is a branch of theſe Laws: And Sir *Edward Cook* in his 10*th Report* in the Caſe of the Iſle of *Ely*, ſaith, That the Kings of this Realm, before the making of any Statute of Sewers, might grant Commiſſions for the ſurveying and repairing of Walls, Banks and Rivers, and other Defences. And of the ſame opinion is the Book of Sir *John Davies* in his *Iriſh Reports*, in the Caſe of the Royal Piſcary of the *Banne*. And Sir *Edward Cook* hath in his firſt Caſe ſet the firſt Statute of Sewers to be in time the 9*th* of *Henry* the Third, which is in *Magna Charta* the Firſt Volume of Statutes, and the moſt ancient that be extant in our Laws.

38 *Ed.* 3. lib. Aſſ. pl. 15.

Sir *John Davy's* Reports.

9 *H.* 3.

By all which is manifeſt, that theſe Laws have been received into the Government of this Realm, in time as ancient as any other were; And I am the rather herein confirmed, for that in the ancient Commiſſion expreſſed in the Regiſter aforeſaid, there be theſe words, That the King *Ratione dignitatis ſuæ regiæ ad providendum ſalvationi regni ſui circumquáque fuit aſtrictus.* Wherein it is hereby made plain, That the King by the Tenure and Prerogative of His Crown, was bound to ſee and foreſee the ſafety of this Realm; and ſo this Law is a Prerogative Law, and ſeems to be as ancient as any Laws of this Realm, and all Prerogatives be without limitations of time; Neither can it be preſumed, that all or any Kings till the time of *Henry* the Sixth were ſo improvident as to want theſe Laws, without the which the Realm could not be defended from the violence of that unmercifull Enemy the Sea; wherein I do conclude, That theſe Laws of Sewers be as ancient as any other Laws of this Kingdom be.

The extent of this Law.

For the extent of this Law, the Title of this Statute ſhews it, *viz. A general Act for granting Commiſſions of Sewers within the Realm*, without any word of Reſtraint, other than theſe *(where need ſhould require.)* And although Expounders of the Laws be not tied to make the Title their Text, either for the body or the bounds of it, yet it may ſerve to give ſome direction in the Expoſition thereof: But to make the Title to be the ground in the material Expoſition of the Law, may lead the Expoſitor many times into errour: For in *Stradling* and *Morgan*'s Caſe in *Plo. Com.* the Title of the Statute was, *For the true anſwering for the Revenues of the King*, and the words in the body did extend the ſame to the Receivers of Subjects; but there the Judges and Expounders of that Law went with the Title in a Statute made in the 23*d* of *Elizabeth*, the Title of the Statute was *For Politick Conſtitutions for the Navy*; and in that Statute there was a new Fiſh-day provided, which no man would have looked for under ſuch a Title.

Stradling and *Morgan.*

23 *Eliz.*

And *Lucian* an ancient Greek Poet compiled a Book, and in the Frontiſpiece thereof Intituled the ſame *A Book of True Reports*; where looking into it, there was not any thing true therein: So it appears though in Acts and Books the Titles and Styles may give help in the Expoſition, and may ſerve as an Index or Table to find out the matter, yet it is not fit to relie upon them, but that they may be uſed or refuſed as occaſion ſhall ſerve.

Howſoever there is better concord betwixt the Title and the Body of my Statute, for the *Corps* of the Act perform as much as the Title promiſed, whereby the Inland Countries of *Notingham*, *Northampton*, *Huntington*, *Bedford* and the like, may have the uſe of this Statute as well as the Maritime Countries of *Lincoln*, *York*, *Cambridge*, *Norfolk*, *Suffolk*, *Kent*, *Suſſex*, *Hampſhire*, *Devon*, *Cornwal*, *Gloceſter*, *Cheſter* and *Lancaſhire*, if not in all, yet in part, as hereafter I ſhall make it appear in my ſecond Lecture upon this Law.

And

And although both the Statute of *6 H.* 8. and the Regiſter, and *Fitz. Nat. Brev.* make all of them mention in thoſe Commiſſions of the County of *Lincoln*, and of no other County; yet doubtleſs the Law-makers and Judges of this Realm, and the Expoſitours did intend then, and did extend them to all the Parts and Counties of the Realm. And yet I take it, that the firſt Original and the chief uſe of theſe Laws, was in the ſaid Maritime Countries, which ſtood in moſt need thereof, and eſpecially *Lincolnſhire*, where be the huge great and vaſt Fens and Mariſhes: but yet notwithſtanding they may ſerve generally for all the Realm of *England*, as the extent of this Statute I reade on hath bounded them.

So herein my concluſion is, that the extent of this Statute is as large as the Realm of *England*.

The neceſſary uſe of it.

From the Title I am now come to the Preamble of this Statute, where the words be very ſolid and weighty; that is, *That the King nothing earthly ſo highly weighing as the advancing the common Profit, Wealth and Commodity of this Realm:* By the which it may appear, That the making of this Law was of all other thought to be moſt neceſſary, and of greateſt conſequence, when the King preferred the ſame before any earthly thing: And the King's care herein became his Royal Perſon very worthily, becauſe by this Statute Safety was brought to the Realm, and Wealth and Profit to the People thereof; greater and better fruits than which, no humane Law can produce: And the chief execution of this Law was moſt aptly left to the King, *Ratione regiæ dignitatis ſuæ*, whoſe Office doth, as the Philoſopher truly ſaith, contain in it great Vertue, high Underſtanding, and Divine Wiſedom, to whoſe high Government, as well our Perſons as our Laws be committed, and the defence thereof is applied to his grave foreſight.

And truly I have taken upon me to reade on thoſe Laws of Sewers, as Mr. *Marrow* did in former times take upon

him to expound in his reading the Laws of the Juſtices of Peace, hoping this work of mine may prove as acceptable to the Commiſſioners of Sewers, as that of his was beneficial to the Juſtices of Peace; the uſe whereof being no leſs commodious to the Commonwealth than that of the Peace, being both general Laws of great uſe and eſteem, and my ſelf being for many years paſt a Commiſſioner in the County of *Lincoln*, I found that theſe Laws were dark and intricate, and came not uſually within the reach and underſtanding of ſuch as were not well ſeen and ſtudied in the Laws.

And becauſe I found the uſe of them to be wondrous neceſſary, I did intend, when occaſion ſerved me, to break the Ice, and enter ſeriouſly into the expoſition of them. And therefore ſeeing theſe Laws being in time moſt ancient, in extent moſt large, and for the uſe moſt neceſſary, I have, with your kind favour, made choice of them to frame my Reading upon; wherein, if upon your peruſal you find any ſcapes or errours, which may ſoon fall from Opinion, *hæc amicè corrige*, and ſuch of them as you ſhall beſtow your liking upon, *his utere mecum*; and this ſhall ſuffice touching my choice made of this Statute.

And as I have formerly declared and delivered the cauſes which ſtirred me up, and the reaſons which confirmed me to reade upon this Statute; Now I do intend to break it up, and I do divide it into theſe ſeveral branches or parts:

1. *Firſt*, To make proviſion to reſiſt the overflowing of the Sea upon the large Marſh-grounds lying in the Maritime Countries, which commonly be the ſureſt for ſoundneſs, the greateſt for compaſs, and the beſt for profit of all the Sheep-walks and Commons of this Realm, which take prejudice and loſs onely by the rage of the Sea.

2. *Secondly*, To provide alſo that the great freſh Rivers and Streams may have their paſſages made clear, and that their Walls, Banks, and other Defences be repaired, kept and maintained, whereby the fair, delightfull, pleaſant and fruitfull

fruitfull Meadows and Paſture-grounds which lie in the greateſt abundance upon or near the Rivers, Brooks and Streams may be preſerved from the inundation of freſh Waters, which many times annoy them, to the great and ineſtimable damage of His Majeſty's Subjects, which be Owners and Farmers thereof.

Thirdly, Whereas Navigation, both for the Exporting of our Homebred Commodities, and for the Importing of Foreign Merchandizes is the chief inriching of this Nation, therefore Ports, Havens, Rivers, and other Navigable Streams and their dependencies, be put within the defence of this Law, being *Oſtia & janua Regni*, for that by the maintenance of theſe the Wealth of this Realm is increaſed, and the Inland Cities, Boroughs and Towns are made partakers with eaſe and ſmall coſt of the Sea's Commodities. 3.

Fourthly, likewiſe this Law giveth redreſs and remedy for the removing of ſuch lets and impediments as are either hinderances to Navigation, or ſtops whereby the abundant Waters cannot have their free paſſage to the Sea. 4.

And *Fifthly*, Becauſe in the ſurrounded Grounds there be moſt commonly the greateſt uſe of Bridges, Calceys, Paſſages and Ways, therefore this Statute hath taken order for them alſo, whereby His Majeſty's People may in thoſe places for their perſons and their goods have both *Salvum & ſecurum conductum.* 5.

In theſe five parts be all the whole materials of this great and worthy Law contained; and therefore according to the ſaid diviſion I have framed a Caſe for the firſt Lecture upon this Law.

The firſt Caſe.

A. Leaſeth to *B.* a Manor on the Sea Coaſts for years, which hath *incrementum & decrementum Maris* by preſcription in the County of *Cheſter*, and the City there, (where a Commiſſion of Sewers is) remainder to *C.* in Fee, Livery is given and taken by Attornies at full Sea within

within the view; the Sea then leaves one hundred Acres of Land with the Shore divided in part from the continent by a Navigable Haven; The Leaſe expired, *C.* enters, the Prince ejects him, and the King ſeizeth this Relinquiſhed Ground.

My Opinion is, That the King hath a part, the Prince a part, and the Subject a part of this Ground; and that it is all within this Statute, but no part thereof within this Commiſſion.

Points of the Common-law.

The Points of this Caſe be three at the Common-law, and five by this Statute.

1. *Firſt*, Whether Livery of Lands may be made within the view in another County, or not?
2. *Secondly*, Whether Livery by the view may be given or taken by Attornies, or not?
3. *Thirdly*, Whether in this caſe Livery and Seiſin may be made by Attornies, or that of neceſſity it muſt be made to the Leſſee for years, and who muſt join in making of the Letter of Attorny to take the Livery? All which Points I muſt maintain affirmatively, elſe *C.* the Subject cannot have any Lands at all.

Points on this Statute.

1. *Firſt*, Whether the Engliſh Seas be within this Realm of *England*, and what intereſt the King hath there, and what intereſt a Subject may have therein by cuſtome and preſcription, and what is meant by the ſaid words, *incrementum & decrementum Maris?*
2. *Secondly*, Whoſe theſe new Iſlands be which ariſe there, and whether they be ſaid to be within the Realm, and what Laws govern the ſame; for that it appears in my Caſe, that the Ground left between the Sea and the Haven is an Iſland?
3. *Thirdly*, Whether the King ſhall have all the Grounds by His Prerogative, or the Subject by the ſaid Preſcription, or the Prince as participating of both? or whether every one ſhall have a part thereof, according to my Concluſion?

Fourthly,

Fourthly, Whether the Grounds left by the Sea be within this Statute and Commiſſion, both or either of them, or neither of them? 4.

Fifthly, What a Haven, a Shore, and the Coaſts be in definition, and the ſeveral properties thereof? 5.

The Reader's Argument.

And as it comes to my turn, I intend to maintain the concluſion of my Caſe: And firſt of the firſt Point.

Livery and *Seiſin* is one of the moſt ancient approved Ceremonies of the Law which hath been uſed for conveying of Lands; and the Law hath a more reſpect thereto than to any other: And it cannot be denied, but that it is the moſt perfect form of any, by the which the freehold and Inheritance of Lands is transferred from one to another, and all Subjects may give and take Lands by this Ceremony; but the King onely is excepted, whoſe Prerogative, is ſuch That as Lands cannot be taken from him, as King, but by Record; ſo Lands cannot be given or granted to him, as King, but by Record: And in the ſame degree is a Count Palatine in his County, becauſe he hath there *Jura Regalia*: And this *Livery* and *Seiſin* may be actually and really done and performed, or elſe it may be done within the view of the Lands intended to be conveyed.

And as touching *Livery* and *Seiſin* to be actually effected, if the Feoffment contain Lands in two ſeveral Counties, and *Livery* and *Seiſin* be made in one County in name of both, this will not paſs the Lands in another county, becauſe the Land paſſeth by the Livery, which is local, and not by the Deed.

But in an exchange of Land in two ſeveral Counties by Deed, the ſame is good, for there the Land paſſeth by the Deed.

But if one make a Feoffment of a Manor lying in Demeſn in the County of *L.* and in ſervices in the County of *M.* theſe ſervices, and ſo Rents, will paſs by attornment of the Tenants, though they lie in a foreign County; and

ſo

ſo of an Advowſon appendant, and ſuch like, becauſe thoſe rents and ſervices paſs not by the local Ceremony of *Livery* and *Seiſin*, but by the Ceremony of Attornment, which is perſonal; and depends upon the perſon which is tranſitory; wherein I take this difference, That if a Feoffment be made of a Manor by Parol, the Advowſon appendant, Villains Regardant, and Rents and Services by Attornment of Tenants, will not paſs to the Feoffee, till the demeſns and Lands be firſt conveyed.

But if the Feoffment be by Deed, then the Rents and Services will paſs by Attornment of the Tenants, and delivery of the Deeds, before *Livery* and *Seiſin* be made to paſs the demeſns.

Then ſeeing that Land in one County will not paſs by Feoffment by exſpreſs Livery made in another County; if then the ſame may be paſſed and conveyed by Livery within the view, is the queſtion of our Caſe: And in my opinion they may, becauſe it is a Ceremony performed by the eye, which is a member or inſtrument which hath his operation by aſpect, *Tam procùl quam propé*.

But expreſs *Livery* and *Seiſin*, which is done by the hand, cannot in reaſon be extended to another place than where the body is: And although the eye be fixed in the head, annexed to the body, yet like the Sun, his beams are carried afar off.

And this Livery by the view, is not a Livery in the County where the body is, but properly in the County where the Land lay, which was the object of the eye; and in this caſe it is ſaid to be Livery onely, and not *Livery* and *Seiſin*, becauſe the *Seiſin* is properly when the party enters, and the entry of the party is that which perfects the work, which is in *proprio comitatu*. And for authority in
28 *E.* 3. *f.* 11. the point, 28 *Ed.* 3. *fo.* 11. there is a Caſe according to my opinion, where the Husband at the Church door, when he was to take one to wife, he made a Deed of Feoffment of Lands lying in another County to the ſaid woman, and then delivered the Deed to her, and ſhewed her the Land,

then

then they married, and he entred in claiming to her uſe; and theſe Lands were thereby well conveyed to the ſaid woman by this Livery within the view, in another County.

And of the ſame opinion (that livery may be given of Lands in another County within the view) is *Coke*, 1 Inſt. 48. *b.*

Now it is fit to be declared, what view is ſufficient, for there be two manner of views, The one general, the other ſpecial: In the ſpecial view, every particular piece of ground is to be ſeen; but in the general view it ſufficeth to take notice of the grounds by the place they lie in: and in my opinion, The general view in my Caſe will ſuffice. For if one make a Feoffment in Fee of a whole Iſland, or of a whole Manor or Town, and make Livery thereof within the view, this is good; and yet it is not poſſible to view every particular piece of ground at once, for Trees, Houſes and Hills might ſo be interpoſed, that the view could not be taken of ſome part thereof, yet notwithſtanding view of the reſt will paſs.

Alſo if Lands be covered with Water, Ice or Snow, theſe will paſs well in a Feoffment or Livery in the view.

In *Brook Title View plac.* 101. the Caſe there may give the rule to our Caſe; for there it is ſaid in a Writ of view, It is not neceſſary that all particulars in *Specie* ſhould be put in view, but to ſee the fields where the grounds lie promiſcuouſly it will ſuffice, and is a good and perfect view. *Brook* 101.

Sed eſt un auter diverſitie concernant veiwe Carſi un fait Feoffment de B. *acre que giſt del auter parte dum Mountaine tout hors del veiwe, la liuery de ceo neſt bone ſans expres veiwe tamen tout voile paſſer per veiwe de parte & ſic in mon caſe ou part' giſt ſouth le ſloud del mere ceo non obſtant paſſe ut parcel del mannor.*

Aſcuns aver teneus & ceo Knightley pur un in 28 H. 8. *in Dier que Livery deins le veiwe doit touts foits eſte fait in caſes de neceſſity ceo urging in reſpect del choſe ou del perſon, del choſe* 28 *H.* 8.

quia leterre giſt del furder ſide dun grand ewe ou in le ewe ou ne puit eſte facile acceſſe del perſon, quia que le Feoffor ou Feoffee ſoit lame ou infirme, & detraher ceo in queſtion Jeo aye miſt mon caſe quia le Feoffment & Liuerey fuit ad plenitudinem maris tamen Jeo ſue de opinion que Liuerey deins le veiwe puit eſte fait ſans aſcun matter de neceſſity ceo urging & ceo Jeo collect per le liuer de 42 Ed. 3. Fitz. Feoffments 54. when the Son did give back the Lands to his Father as freely as his Father had formerly given the ſame to him; and this was within the view: and it doth not appear that either this Livery or the other made to the ſaid woman in 28 *Edward* 3. were made of any neceſſity urging the ſame.

42 Ed. 3.

And there be ſome perſons which can neither give nor take by Livery within the view, and that is where the Feoffor or Feoffee is blind: So a Major and Commonalty, Dean and Chapter, or other corporate and politique capacities cannot give or take within the view. Some have held a difference that a Parſon of a Church might not take by Livery within the view to him and his Succeſſors, becauſe that came to him in his politique capacity, which had no Eyes; but if he were ſeized in the right of his Church, that he might infeoff *I. S.* thereof by Livery within the view, becauſe this was a wrong to the Church, and therefore was in the power of his natural capacity, which had Eyes.

A Conceit.

But the main Point in my Caſe is, Whether Livery within the view may be given and taken by Attorneys; and whether the view is ſo incident to the perſon, that it cannot be imparted to another.

It is true, that the perſonal view cannot be lent to another, or divided from the perſon, no more can the perſonal touch or act of my hand be imparted to another; and yet expreſs Livery, which is the Deed and act of the hand, may be done *per auter maine*.

7. Reports, *Engleſield's* Caſe.

Sir *Francis Engleſield's* Caſe in the ſeventh *Report* of Sir *Edward Cook*, gives us a pretty difference, where the act to be done

done is inſeperably tied to ones perſon, and where not; as in the Caſe of *Thomas* Duke of *Norfolk*, where upon conveyance of divers Manors to *Philip* Earl of *Arrundel* his Son, there was a Proviſo, That the Duke might revoke the ſame upon ſignifying of his mind under his own proper hand in writing, *&c.* This power of Revocation was not transferred to the Queen by the Attainder of the Duke, becauſe it was inſeparably tied to his own proper hand: But the principal Caſe there of *Engleſield*, where the Lands were ſetled upon his Kinſman, with power, That upon tender of a Ring by him he might revoke the uſes, and this was forfeit by his Attainder, and the Queen by a Letter of Attorny made to two, did tender the Ring; for this was not preciſely or literally tied to *Engleſield*'s perſon, no more than payment of Money, or ſuch like. Canc. in *Comb*'s Caſe.

And ſo in our Caſe, though by the Law I take it that Livery within the view muſt be in the view of both the Parties, yet this may be done by Attornies; for as my own hand is not preciſely tied by the Law to an expreſs livery, no more is my own eye expreſly tied to this view.

And we ſee in views in an Aſſize, the Under-ſheriff, or the Sheriff's Bailiffs, by his direction, may make the view; and yet the Writ is directed to the Sheriff to doe the ſame; and in thoſe Caſes an intellectual view will ſerve, as if the Jurours know the Land; but ſuch an intellectual view will not ſerve in a Feoffment, but there the view muſt be actual. 36 *H.* 8. *Dyer* *Morſe* and *Pennington*'s Caſe.

Yet I take this difference, that if a Letter of Attorny be directed to *A. B.* to make *Livery* and *Seiſin*, he cannot doe the ſame within the view, for therein he doth not purſue his Warrant; but if the Letter of Attorny be ſpecial, to give or take Livery within the view, I am of opinion, then the Livery may in ſuch a caſe be given and taken by Attornies within the view, as well as in *Combe*'s Caſe in Sir *Edward Cook*'s 9th *Report*, where it is affirmed that a ſurrender of a Copihold may be given and taken by Attor-

nies, which is as perſonal as this is in the taking part, becauſe Fealty ought to be made.

Some things may in this Caſe be farther alledged in this third point, which I now have in hand, that is, Who muſt make the Letter of Attorny on the Feoffee's part, whether the Leſſee for years, or he in the remainder, or both of them: For Leſſee for years, it is to be noted, that his Eſtate hath not any perfection thereby, and he ſeems himſelf but a Deputy, and if ſo, then a Deputy cannot make a Deputy; but yet he is not merely a Deputy, for if there be two Leſſees, the remainder in fee to *J. S.* one of the Leſſees may take the *Livery* and *Seiſin*; yet if a Letter of Attorny be made to two jointly, one of them cannot take it; and if in our caſe the Leſſee had died before entry, the Livery might have been made to his Executours, and powers and authorities cannot be apportioned and come to Executours in ſuch manner; *Ergo*, It is more than a power of a Letter of Attorny for the reaſons aforeſaid, and for theſe inſuing: For the Leſſee for years cannot be prohibited from taking his Livery by the Leſſor, but a Letter of Attorny may be countermanded; yet the Leſſee alone cannot make this Letter of Attorny, neither can he in the remainder make the ſame, becauſe he could not himſelf accept of the preſent Livery, neither can he meddle with the preſent poſſeſſion which a *Livery* and *Seiſin* yields.

But I am of opinion, That Leſſee for years, and he in remainder, muſt join in the Letter of Attorny for theſe Reaſons:

1. *Firſt*, They were both one party to the Deed, ſo ought they to be to the Letter of Attorny, which is to give life thereunto.

2. *Secondly*, They be but in Law one Tenant.

3. *Thirdly*, They ſhould join in Advowry.

And in many Caſes the Leſſee ſhall have aid of him in remainder for the privity between their Eſtates; and although the Leſſee gets no Eſtate by the Livery, yet he aſ-

ſiſts

ſiſts himſelf thereby with the aid and ſtrength of him in the remainder, and the Livery goes through his Eſtate, and ſo paſſeth into the remainder.

Therefore my Concluſion is, that they ſhall join in this Letter of Attorny; and hereby I ſuppoſe I have conveyed a good Eſtate in the Manor to *J. S.* in the remainder, to maintain my poſition for him in the end of my Caſe, and here I end my Three Common-law Points, and now am come to the Statute.

Notwithſtanding what is here affirmed for Law, it ſeems doubtfull whether this Livery within the view was well given: For,

1. My Lord *Coke* 1 Inſt. 49. *b.* puts this very Caſe, *viz.* A man makes a leaſe for years to *A.* the remainder in fee to *B.* and makes livery within the view; and he concludes that ſuch livery is void: For it muſt be preſuppoſed (as my Lord *Coke* doth) that the livery is made to the Leſſee for years, as by Law it ought to be; for the livery could not be made to him in remainder, becauſe the Poſſeſſion belonged to the Leſſee for years. And though the livery be not neceſſary in this caſe for the Leſſee himſelf, yet 'tis for the benefit of him in remainder. Now ſuppoſing it to be made to *A.* Leſſee for years, ſuch livery is void, if made onely within the view, becauſe no man can take by force of a livery within the view, but he that taketh the Freehold himſelf, which *A.* doth not. 1 Inſt. 49.

And as for the giving of livery in this caſe within the view to *B.* to whom the remainder in fee

is

is limited, as well as to the Leſſee for years. It is confeſſed here that he in the remainder cannot accept of the preſent livery, (though it ſhall enure to his benefit) ſo that the joining him in the Letter of Attorny with the Leſſee for years, cannot make the livery within the view good; ſeeing he is incapable of taking it, for that he hath not the Poſſeſſion.

2. If livery to *A.* Leſſee for years, given to him perſonally within the view were good, yet it ſeems doubtfull whether an Attorny can give or take ſuch livery within the view, though the Letter of Attorny be ſpecial to that purpoſe: for if the Law allows not of any ſuch livery by an Attorny within the view, as my Lord *Coke*, 1 Inſt. 52. *b.* ſeems to be of opinion, where he ſaith, that the Warrant is intendable in Law of an actual and expreſs livery, and not of a livery in Law, and cites for it *Yarham's* Caſe, 3 *Eliz.* then without queſtion the ſpecial direction of the Party to give livery within the view, cannot make it good, no more than where a Letter of Attorny is to deliver livery of ſeiſin after the death of the Feoffor; for no ſuch ſpecial appointment can controll a rule in Law to the contrary.

Yarham's Caſe, 3 *Eliz.*

The

The Reader's Argument upon the Statute and Commiſſion.

The Sea within the Realm of England.

FIrſt, touching our *Mare Anglicum*, in whom the intereſt therein is, and by what Law the Government thereof is, is a fit queſtion, and worth the handling. And in my Argument therein, I hope to make it manifeſt by many proofs and precedents of great worth and eſteem, that the King hath therein theſe powers and properties, *videlicet.*

1. *Imperium Regale.*
2. *Poteſtatem legalem.*
3. *Proprietatem tam ſoli quam aquæ.*
4. *Poſſeſſionem & Proficuum tam Reale quam Perſonale.*

And all theſe he hath by the Common Laws of *England*: in the 6th of *Richard* the Second, *Fitz. Prot.* 46. it is ſaid, *That the Sea is within the Legiance of the King, as of his Crown of* England; This proves that on the Seas the King hath *Dominationem & Imperium ut Rex Angliæ*, and this by the Common-law of *England.* 6 *R.* 2.

The Charter of the Admiral of *England* hath theſe words in it, *Quod habeat poteſtatem in cauſis maritimis ac omnia bona waviata Flotſan Ietſan & Lagan ac omnia bona Mercimonia & catalla in mare deperdita ſeu extra mare projecta ac omnia & ſingula caſualia tam in vel ſuper mare vel littora crecas vel coſteras maris quam in vel ſuper aquas dulces portus flumina rivos aut alios locos ſuperinundatos quoſcunque inter Fluxum & refluxum maris ceu aquæ ad plenitudinem à quibuſcunque primis pontibus verſus Mare per totum Regnum Angliæ.* Admiral's Charter.

Imprimis, This Charter is under the great Seal of *England, quod eſt Lex Angliæ.* 1.

The

2. The King grants to the Admiral thereby power in Maritime Cauſes, which proves the King's legal power and juriſdiction on the Seas.

3. He grants to him *bona in mare deperdita ſuper mare emergentia & extra mare projecta*, which be profits ariſing on the Sea.

4. And all theſe are ſaid to be *per totum Regnum Angliæ*; *Ergo*, the Seas be *infra Regnum Angliæ*.

Prerogativa Regis, c. 11. In the Eleventh Chapter *de Prerogativa Regis*, it is declared, *Quod Rex habebit wreccum Maris per totum Regnum & Balenas & Sturgiones captos in Mari vel alibi infra Regnum Angliæ :* and this was by the Common Laws before ever this Statute was made; for as the King was and is the moſt Excellent Creature within his Realm, ſo the moſt Excellent things which Land and Sea afford are appropriate unto him. And this Statute alſo proves the Sea to be *infra Regnum Angliæ*, and that the profits therein, and thereon ariſing belong to the King by the temporal Laws of *England*.

Sir *Henry Conſtable's* Caſe. In the Caſe of Sir *Henry Conſtable* in the Fifth *Report* of Sir *E. Cook*, it is ſaid, That *Flotſan, Jetſan and Lagan are goods on or in the Sea, and that they belong to the King, and the King by his Charter granted them to the Admiral.*

Stat. 18 *E.* 3. 28 *H.* 8. The Statute of the 18th of *Edward* the Third; *Let the Sea be open to all Strangers :* and the Statute of 28 *H.* 8. Chap. 15. *If any Treaſon, Murther, or other Felony be done on the Sea-coaſt, the Offenders ſhall be tried in ſuch County as the King ſhall appoint by Commiſſion to be directed to the Admiral and others, to try the ſame* per Sacramentum duodecim, which is by Jury.

31 *H.* 6. And the Statute 31 *H.* 6. Chap. 4. there is a Reſtraint, That no Subject do attach any Stranger in amity within this Realm on the Sea.

Here the Statute-laws are in force on the Seas, as appears by the examples; but theſe ſeem to tie the Perſon onely.

And

And in the *Iriſh Reports* of Sir *John Davies*, in the Caſe of the Royal Piſcary of the *Banne*, it is ſaid, *That the Sea is the King's proper Inheritance.* Sir *John Davies.*

And Mr. *Bracton*, *lib.* 2. *cap.* 12. in his Title *de acquirendo rerum dominio*, ſetteth forth a preſcription in theſe words, *Quod J. S. & anteceſſores ſui fuerunt quiet' de Theolonio & aliis conſuetudinibus dandis per totum Regnum Angliæ tam per terram quam per mare:* and many times in that Chapter he reiterates the ſame words; which is a ſtrong proof that the Sea is *infra Regnum Angliæ*, and that the King governs there by his Common Laws of *England*; for that preſcription is a main and material point of the Common Law: And the like is alledg'd in Sir *Henry Conſtable's* Caſe by way of Cuſtome in the Citizens, as of *Briſtol*, to have *Flotſan* on the Seas between the high-water and the low-water Marks. *Bracton. l.* 2. *cap.* 12.

For the Prerogative and Intereſt that the King of *England* hath in the Seas of *England*, and the Antiquity of the Court of Admiralty; See the Record in *Co.* 4 Inſt. 142.

So I take it I have proved the King full Lord and Owner of the Seas, and that the Seas be within the Realm of *England*; and that I have alſo proved it by Ancient Books and Authorities of the Laws, and by Charters, Statutes, Cuſtoms and Preſcriptions, that the Government therein is by the Common Laws of this Realm.

One Caſe and one Statute ſeem to ſway to the contrary, and that is *Lacy's* Caſe, where one was ſtricken on the Seas, and died on the Land, that the Common Law could not try this Murther: It is true, becauſe that Trial was to be by Jury, which muſt come out of a proper County, which could not in this Caſe, becauſe the Sea was not within County-ground, and ſo no Jury could be ſummoned there. *Lacy's* Caſe.

Le Roll de Oleron.

And I acknowledge that the King ruleth on the Sea by the Laws Imperial, as by the Roll of *Oleron* and other; but that is onely in the particular Case of Shipping, and for Merchants and Mariners: But the King hath neither the property of the Sea, nor the real and personal profits there arising, but by the Common Laws of *England*, and in proof thereof the Book 15 and 16 *Eliz. in Dyer*, where the Grounds gained from the Sea pertained to the Queen;

15 & 16 El. Dyer.

And in Sir *John Davis* his Reports, *Piscar. de Ban.* 56. That the King shall have the Land gained out of the Sea.

Which must needs be by the Common Law of *England*; for no Law gives the King any Soil, but onely the Common Laws of *England*; so this is sufficient proof for the real profits, and for the personal profit the Charter of the Admiralty and other Cases aforesaid make it manifest.

13 R. 2. Rast. Admiralty.

And there is a Statute made in 13 *R.* 2. *cap.* 5. which restrains the Admiral that he do not meddle with any thing done within the Realm, but on the Seas; by which it may be collected, that the Seas be not within the Realm of *England*: But in my opinion the intent of that Statute did rather limit the Admiral how far he should extend his Jurisdiction, than any way to set forth the bounds of this Realm: wherein my conclusion herein is, That my Statute hath his extent within all the Realm of *England*; and that English Seas being within the Realm, be within the bounds of my said Statute of Sewers, and that Statute-law is in full power on the Seas, as by the Cases and Statutes mentioned formerly doth appear.

Of Islands.

De Insulis.

BEcause in my Case in matter, though not in expres words there is an Island, therefore it comes now fitly in turn to declare whose the same is in ownership, and what

what Laws the ſame is to be governed by: And firſt, of the definition thereof: *Juſtinian in Suis Inſtitutionibus* ſaith, that *Inſula eſt locus undique circumdatus aquis*, p. 153. *Definitio Inſulæ.*

And with this agreeth *Britton*, in his Title of Purchaſe, *England* of it ſelf is not *Inſula*, becauſe it is not *undique circumdatus aquis*. *Anglia.*

But *England* and *Scotland* be one intire Iſland, and the moſt famous in the whole World; *Scotia.*

England, take it *per ſe eſt peninſula*, that is *penè Inſula*, almoſt an Iſland; for on all parts it joins to the Sea, but towards ſome parts of *Scotland*. *Peninſula.*

Gernſey and *Jernſey* be Iſlands on the Sea, but it ſeems by the Reſolutions in *Calvin*'s Caſe, the *7th Report*, That they be not within the Realm, nor governed by theſe Laws, becauſe the King hath them by his Title of *France*. *Gernſey.* *Jernſey.*

The Iſle of *Man* was in times paſt a petty Kingdom, and had a King, but he was onely as a Viceroy, and under the King of *England*, as by a Record. *Man.*

Where *Artold*, King of *Man*, made ſuit to the King of *England* to come into *England*; but whether *Man* be within the Realm or not, ſeems to be put without queſtion in Sir *Edward Cook*'s Caſe of *Calvin*, and by *Kelway's Reports*, 11 *H.* 8. that it is not, for there an office found after the death of the Earl of *Darby* by a Writ out of the Chancery of *England* was avoided, becauſe as the ſaid Books do affirm *Man* was not within the Realm of *England*; but under the favour of theſe Books, that is no neceſſary cauſe to avoid that Office; for in my opinion the ſaid Office of the Earl of *Darby* was void, *quia in Man breve Domini regis non Currebat*, and ſo in the County *Palatine* of *Cheſter*, *breve Domini regis non Currit*, 161. *tamen Comitatus Ceſtriæ eſt infra Regnum Angliæ.* Mr. *Cambden* in his Hiſtory *de Inſulis* is of opinion, that *Man* was a Member of the Realm of *England*: and therein he hath theſe words, That *Man* is an Iſland ſituate in the mid-way between *England* and *Ireland*. *Sed de qua utrique terrarum applicari de Jure debuerat ab antiquis non ambigebatur, demum in hunc modum lis iſta quievit quoniam advectos periculi Cauſa venenoſos hæc terra* 11 *H.* 8. *Kelway's R.* *Cambden.*

vermes admiſit, ergo eam Britannis applicandum Cenſura Communis dictavit, by which it may appear, that the Iſle of *Man* was within the Realm of *England*; or at the leaſt a Member thereof.

Wight. But I do take the Iſle of *Wight* originally to be parcel of *England*, and is a part of the County of *Hampſhire*, and was as it were divorced from the Continent as was *Sicily* from *Italy*; the one, as Poets feign, was parted from the Continent or main Land by an Earthquake; the other, as is imagined, by the rage and violence of the Sea: *Cambden, fol. 707.* *Inſula Vectis inquit Cambdenus in ſuis inſultis Britannicis, fol. 707. eſt pars Comitatus Hamtoniæ & à Continente Britanniæ avulſa eſt ut cohæſiſſe videbatur*, for many do imagine that it was torn from the main Land by the violence of Waters, as of late years parcel of the *Spurnhead* in *Yorkſhire*, which before did adhere to the Continent, was torn therefrom by the Sea, and is now in the nature of an Iſland: Yet the ſame is within the Realm of *England*, and remains parcel of *Yorkshire*; and the like is ſaid of the Iſland call'd *Silly*. Many other ancient Iſlands there be, which being in the Engliſh Seas be parcel of this Realm, which I will paſs over to avoid prolixity.

Nova Inſula. But in our Caſe a new Iſland is riſen up in the Engliſh Seas, to whom the ſame in point of property and ownerſhip ſhall belong, and what Laws the ſame ſhall be governed by, comes now juſtly to be diſputed of. *Juſtinian* in his *Inſtitutes, De rerum Diviſione*, ſaith, *Quod inſula in mari nata (ut Delos) eſt primi occupantis.* And *Britton*, one of our ancient Writers in his Book *Titulo Purchaſe, fol. 86.* ſaith, That if a new Iſland riſe up in the Sea, *datur primo occupanti*, and agreeth fully with *Juſtinian* therein; but ſaith he, If it be taken or divorced from the Continent, then it continueth to the former Owner; but clearly our Law of *England* doth not agree with either of thoſe Authours in the point of ownerſhip. For, if, as I have formerly delivered it, the Sea in property, poſſeſſion and profit, *tam in aqua quam in ſolo*, belongs to the King in the right

Juſtinian.

Britton 86.

of

of His Crown of *England*, as I take the Law clearly to be, then it followeth as a conſequent, That the Ground which was the King's when it was covered with waters, is His alſo when the waters have left it; For our Law admits not any thing, either real or perſonal to go *primo occupanti*; but when an Owner cannot be found, the Common Law gives it *Domino Regi*, as Waifs, Strays, Wreck of the Sea, Treaſure found, Eſcheated-lands, and ſuch like; ſo that my opinion is conceived in this, that in point of ownerſhip and property, the ſaid new Iſland is the King's.

But yet I am likewiſe of opinion, That a new Iſland riſen from the bottom of the Sea, although it be within the Realm, yet it is neither within County, Pariſh nor Town of this Realm, till the King by his Edict or Proclamation have ſo declared it.

There may be Iſlands alſo within the Land compaſſed about with freſh Rivers, as the Iſle of *Axholm* in the County of *Lincoln*, and *Sheppey* in the County of *Kent*, and divers others. But Mr. *Bracton* in his Book *de acquirendo rerum dominio*, doth very well deliver the Law concerning his new Iſlands which ariſe in great Rivers; his words be theſe, *Habet etiam locum eadem ſpecies acceſſionis Inſula nata in flumine quod ſi quidem mediam partem teneat Communis eſt eorum qui pro indiviſo ab utraque parte fluminis prope ripam prædia poſſident pro modo latitudinis cujuſcunque fundi que latitudo prope ripam ſit que ſi alteri parti proximior ſit, eorum eſt tanta qui ab ea parte prope ripam prædia poſſident: Si autem inſula in Mari nata ſit quod raro accidit occupantis ſit Domini Regis non tamen credas proprium alicujus agrum in formam inſulæ redact' inſulam eſſe ut ecce flumen dividatur in ſuperiori parte & circuit agrum alicujus & demum infra in quo caſu ejus erit ager cujus prius fuerat: Cavendum quoque erit in metienda vicinitate inſularum quia poteſt quis in hoc de facili decipi ponatur igitur punctus quod in medio inter utrumque agrum & ſecundum hoc ſi inſula citra punctum ſit vel hujus tant' vel illius tant' erit ſi autem ſit & citra punctum & in ipſo puncto & ultra tunc pro indiviſo: Communis erit ut tantam*

Bracton, lib. 1. cap. 2.

tam mihi de ipso insula cedat qua continentur in medietate puncti usque ad agrum meum. Si autem insula rotunda inveniatur hoc observetur quod omne quod propinquius est mihi cedat, & ita vicino cedat quod ei vicinius erit.

But whether the Laws of this Realm be of force in the ſaid new-ſprung-up Sea Iſlands, or not, is a queſtion: It appears in *Calvin*'s Caſe, and in the Caſe of the Taniſtry in the *Iriſh Reports*, That if the King conquer an Iſland or Nation, the ſame is no part of *England*, nor the Laws of *England* there in force, till the King ſhall ſo declare the ſame, but the own proper Laws ſeem to be in force there; but if the King conquer a Nation from an Infidel, there the ancient Laws of that Nation upon the conqueſt are extinct; but the Law is not ſo of another Chriſtian Region, as *Callis*, *Guyen*, *Bulloign* and the like. And although *Ireland* was under the obeyſance of the King, yet the Laws of *England* were not there in force, till the King ſo declared the ſame.

Callis.
Guyen.
Bulloign.
Ireland.

Wales. And although *Wales* before the Reign of *E.* 1. was within the Fee of the King of *England*, yet was it not parcel thereof, till the Statute of 12 *E.* 1. ſo made it; and although that Statute ſo annexed *Wales* to *England*, yet being but by the word or figure *adjuncta*, the Laws of *England* were not totally in force there till the Statute 27 *H.* 8. ſo declared them, as is holden in *Rice Thomas*'s Caſe in *Plo. Com.* but notwithſtanding whether *Wales* be within my Statute, or not, is queſtionable, for theſe Reaſons following: Firſt, it is clear that a general Law unſtinted and unbounded ſhall extend to *Wales* as well as to *England*; but our Law grants Commiſſions within the Realm of *England*, and ſo preciſely preſcribes it to bounds; and it may ſeem that the Parliament took it ſo in 1 *Mar. cap.* 11. where Commiſſioners of Sewers were authorized in the County of *Glamorgan*, which, as may be objected, need not, if *Wales* had been formerly compriſed: and ſome new Statutes, as that of Alehouſes in 1 *Jac. cap.* 9. and that of Rogues, 1 *Jac. cap.* 7. extend the ſame to the Realm of

England

England and Dominion of *Wales*, as if *Wales* ſhould not be contained in the words, (the Realm of *England*) yet notwithſtanding in my opinion this Statute of 23 *H.* 8. extends to *Wales*; for although the Statute of the firſt of *Mary* gave power to Commiſſioners in *Glamorganſhire*, that was for a ſpecial purpoſe, which, as was conceived, the Statute of 23 *H.* 8. did not in *England* extend thereunto, that as for the carrying away of the Sand which was thrown upon their Grounds; but in that Statute it may well be perceived, that the Statute of 23 *H.* 8. was of force there; and inſerting the words, *Dominion of Wales*, in the ſaid Statute of Poor and Rogues, was rather of ſuperabundance to ſatisfy ſome which might *nodum in ſcirpo querere*, make a doubt where none was, than that they were there put for any neceſſity requiring the ſame: But I am of opinion, that in this new-ſprung-up Iſland the Laws of *England* are there in force, becauſe when it was Sea, the ſame was under the Government of theſe Laws; and although the nature and quality thereof be changed, *viz.* dry Land for full Sea, yet the ſame Laws and Government remain in force; ſo that I hold this new Iſland within the Statute, and that the property thereof is the King's.

Now occaſion and time gives me fit opportunity to treat of Grounds which be newly gained from the Seas. If, as I have formerly declared, the Grounds be the King's when they be covered with Waters, it muſt needs be held an infallible ground, that they be alſo the King's when the Waters have left them dry; and when the Waters had their being on the ſame, the whole Profit there ariſing did appertain to the King; yet I have known in ſome Countries where the Frontagers have claimed thoſe Grounds ſo left, by a pretended Cuſtome of Frontagers, and ſome probable reaſon might be ſhewn, wherefore they ſhould have the ſame; for as their Ground was neareſt the Sea, and ſo next to the charge to repair the Defence, and next to the loſs where any overflow happened, it might therefore ſeem reaſonable, that as they were put to the greateſt charge,

charge, and in peril of the loſs of their Lands, that ſo if Lands were left by the Sea affront them, that theſe Lands might accrew unto them as a reciprocal conſideration for their charge and loſs; but I take it that of late the Law hath in theſe Caſes been oftentimes ruled for the King againſt the Subject; for at *Croft* in the County of *Lincoln*, 1600 Acres were gained from the Sea, affront the Manor of Sir *Valentine Brown* there, yet he was put to obtain a grant from the King thereof: and one *Buſhey* of St. *Kegneys* claimed Grounds left by the Sea, by the ſaid pretended Cuſtome of Frontage, but they were decreed againſt him in the Court of Wards, in 12 *Jac. R.* in which Caſe I was of Counſel: For it were inconvenient that the Subject ſhould have Frontage, and yet no bounds preſcribed thereto; ſo that ten thouſand Acres might be left affront a Man's Manor, which were not fit a Subject ſhould have this large Inheritance by pretence of ſuch allowed Cuſtome; and I ſuppoſe I may herein ſay in this Caſe, as Mr. *Plowden* doth of his Silver Mines, That it is inconvenient a Subject ſhould have the Silver Mines in his Grounds, for ſo might he become richer than the King.

So it is not fitting that a Subject ſhould have the Grounds left by the Sea, when ſo much may happen to be left as the King's own Lands in the Realm come to; and ſo becauſe *nimium ſe exaltat in prerogativam Regis*, I am of opinion the new gained Grounds from the Sea appertain to the King as a Royal Eſcheat, and not to the Subject; but in my Caſe here is a preſcription where the owner of the Manor hath *Incrementam & decrementum Maris*; of what force this is, is now to be argued; therefore I will now declare what intereſt a Subject can or may challenge in the Seas, in Grounds gained therefrom.

Perſonal profits ariſing on the Sea, Subjects may have and challenge by cuſtome and preſcription, as to have free Piſcary on the Sea; and a Parſon had Tythes of Fiſh gotten in the Sea by the Inhabitants of his Pariſh; and yet the Sea, nor any part thereof is not in any Pariſh, but it followed the perſon.

In

In Sir *Henry Conſtable's* Caſe, the Citizens of *Briſtol* claimed Flotſan (which be goods floating in the Sea) by cuſtome, in *Bracton*, *cap.* 12. one alledged to be diſcharged of Toll or Cuſtome on the ſeas by preſcription, in the Caſe of the Swans; in Sir *Edward Cook's* 7. *Report*, one preſcribed to have game of wild Swans at *Abbotberry*, in a Creek of the Sea, which is a member or arm of the Sea: and in Sir *Henry Conſtable's* aforeſaid, it is taken and received for Law, that a Subject's Manor may extend to the low-water mark by preſcription.

Sir *Henry Conſtable's* Caſe. *Bracton.*

Caſe of Swans.

So it was reſolved and adjudged by all the Barons of the Exchequer, 16 *Car.* 1. in *Ca. ſcacc.* in a cauſe by Engliſh Bill between the King's Attorney, and Sir *Samuel Roll* and others. That the Soil whereupon the Sea flowes and reflowes, *ſcil.* between the High-water mark and Low-water mark, may be parcel of a Manor of a Subject. Roll *abr.* Prerogative *Le Roy*, 170.

Sir *Samuel Roll's* Caſe.

And ſeeing all theſe a Subject may have in and on the Seas wherefore then ſhould he not have all the grounds left by the Sea by preſcription? To that I anſwer, That he cannot have claim in any thing by preſcription and cuſtome, but that which lieth in uſe, which is the life of them both; but Lands, and Grounds which have alwaies been Sea, could not be nor lie in uſe, and therefore they cannot be claimed, nor the ſame can be bounded out by preſcription or cuſtome; yet Lands between the high-water mark and low-water mark the bounds thereof may be preſcribed to belong to, or to be parcel of the Manor, becauſe in every 12 hours, or in every day they lie dry, and ſo a Subject all that time may have uſe of them, and ſo of all the reſt of the ſaid things, but in that which never lay in uſe, no cuſtome or preſcription could take hold on, inſomuch that in my Opinion, no preſcription nor cuſtome can fetch Lands farther than the low-water mark.

Grounds left.

BUT now what grounds ſhall be ſaid a leaving by the Sea, is a point in my Caſe alſo, for it is certain that at ſpring-tides the Sea uſeth to overflow the *Marſhes* in *Lincolnſhire* and *Norfolk*, and returneth within a ſhort ſpace again; theſe being uſual and annual, be not accounted grounds left or gained from the Sea; ſo becauſe the Marſhes in *Lincolnſhire* and the Sands in *Lincolnſhire* be overflown every 12 hours, and then dry again, they are not accounted grounds left or gained from the Sea, becauſe the Sea hath daily her recourſe thereon: and therefore in 15 and 16 *Eliz.* in *Dyer fo.* 326 in the Caſe there was a quantity of ground was left by the Sea, and whether the King, or he whoſe grounds were adjoining ſhould have them, was there made a queſtion; but in that Caſe there is an excellent preſident ſet down, very apt for the handling of this point, put in 43 *E.* 3. *Contra Abbat' de Ramſey de quodam proceſſu in Scaccario facto verſus dict' Abbat' ad oſtendendum quare Sexagint' acræ mariſci in manus dom' Regis non debent ſeſiri quas predict' Abbas appropriavit ſibi & domui ſuæ ſine licentia Regis ſuper quandam preſentation' virtute cujuſdam generalis Commiſſion' de terris à Rege detentis & concelatis. Abbas reſpondit quod ipſe tenet maner' de Braunceſt quod ſituatum eſt juxta mare et quod eſt ibid. quidam mariſcus qui aliquando per fluxum maris minoratur & aliquando per defluxum maris augetur abſq; hoc quod appropriavit ſibi prout per preſentation' predic' ſupponebatur.* And the Attorney of the King maintained the contrary, and thereupon the King and the Abbat were at an iſſue; ſo by the Caſe I gather theſe matters:

15 *Eliz. Dyer* 326.

43 *E.* 3.

First, That if by little the Sea ſometimes decreaſe and leave ſome parcel to the Land, and ſome other times run over the ſame again, this ground belongs not to the King; for theſe be grounds whereto the Subject may have a property, as in the grounds of the ſhore, but otherwiſe it

is

is where great quantity of ground which had always been drowned before is left, that belongs to the King.

Alſo by this preſident the Law was taken to be, that theſe grounds left by the Sea to the Land, were in the County of *Norfolk*, whereto they did adjoin, and in my opinion within that Pariſh whereto they lay; for there was a Preſentment, which was by a Jury of *Norfolk*, and the Jury taken to try an Iſſue muſt be *de viceneto ejuſdem comitatus*: but note there, the Preſentment was by a Jury *de Corpore Comitatus*, in 22. *Lib. Aſſiſ. pl.* 93. The Caſe was, That a River of water did run between two Lordſhips, and the ſoil of one ſide, together with the River of water, did wholly belong to one of the ſaid Lordſhips, and the River by little and little did gather upon the ſoil of the other Lord, but ſo ſlowly, that if one had fixed his eye a whole day thereon together, it could not be perceived; by this petty and unperceivable increaſe, the increaſment was got to the owner of the River; but if the River by a ſudden and unuſual floud had gained haſtily a great parcel of the other Lords ground, he ſhould not thereby have loſt the ſame: and ſo of petty and unperceivable increaſements from the Sea, the King gains no property, for *De minimis non Curat Rex*; but put the caſe the Sea overflow a field where divers mens grounds lie promiſcuouſly, and there continueth ſo long, that the ſame is accounted parcel of the Sea, and then after many years the Sea goes back and leaves the ſame, but the grounds are ſo defaced, as the bounds thereof be clean extinct and grown out of knowledge, it may be the King ſhall have thoſe grounds; yet in Hiſtories I find that *Nilus* every year ſo overflows the grounds adjoining, that their bounds are defaced thereby; yet they are able to ſet them out by the Art of *Geometry*.

Lib. 22. *Aſſ. pl.* 93.

But if the bounds can be known, in ſuch Caſe, if the Sea hath overflowed a man's Land for forty years, and then goes back, he ſhall have

his Land again, and not the King. *Mich.* 7 *Jac.* Roll *abr.* 168. *per Cooke & Foster*, Roll *abr.* Prerogative *Le Roy.* 168.

The Prince Count Palatine of *Chester.*

Theſe grounds in my Caſe which are left by the Sea, and lie from the haven next to the ſhore, are as I have formerly delivered it within the County Palatine of *Cheſter*; and therefore whether the Prince or the King ſhall have them, is now my queſtion: The Prince hath not onely *Jura Regalia*, but alſo *Eſcheta Regalia* within his ſaid Palatinate, and ſo in my opinion is not onely owner of the County, but Lord of the Prerogatives there, and all Juriſdiction is to the Prince, onely a Writ of Error lieth in the King's Bench of a Judgment there, like an Appeal to *Cæſar*, then he is Lord of thoſe Laws by which the Freehold and Inheritance of thoſe lands be ruled, wherefore then ſhould not theſe lands belong to his Grace? And firſt it is uſual to have a Commiſſion directed to enquire of theſe Lands *ut de terris concelatis*, and this inquiry ſhall be by Commiſſion; if that Commiſſion be to iſſue out of the County Palatine of *Cheſter*, then the Lands would queſtionleſs fall to the Prince, and the enquiry to be made of the Freeholders of the ſaid County Palatine.

Barkley's Caſe.

The Caſe put in *Barkley's* Caſe in the *Comment.* of Mr. *Plowden*, *fo.* 129. doth force much againſt the princes Title; for there it is put, that the Biſhop of *Durham* had Liberties and Privileges in *Terris ſuis inter Fluvios de Tyne & Teſe*, and afterward purchaſed more Lands between theſe two Rivers, the ſaid Liberties and Privileges ſhall not extend thereto; and ſo if one have a Warren in his Lands in *Dayle*, and he purchaſe other Lands there, his Warren cannot be extended upon theſe new purchaſed Lands, for ſaith the book, *Things or privileges confined to certain Precincts or Dominions, cannot be extended farther, though the Dominion be inlarged, and that they ſhall not be inlarged with the inlargement*; but the County Palatine veſted in the Prince, is preſcribed within no other bounds than the word County doth confine it; and therefore this falling to be within the

County,

County, ſhould be properly his, and as I am informed, the Prince hath ſpecial words therefore in his Charters, if it were granted that theſe grounds could be claimed by Charters; but I am clear of Opinion, That no increaſe of the new left grounds can poſſibly become within the County of the City of *Cheſter*; for the bounds thereof cannot extend over that circle which their Charter hath confined them to: and ſo for the cauſes and reaſons formerly declared, I take it, That the ſaid Iſland is the Kings, the ground left between the haven and the ancient ſhore, belongs to the Prince as Earl of *Cheſter*; and the ſhore becauſe of the ſaid preſcription appertains to *C.* the Subject as parcel of the ſaid Manor; and ſo according to my ſaid concluſion of my Caſe, here the King hath a part, the Prince a part, and the Subject a part of the grounds left by the Sea.

My Tenets therefore be theſe:

1. Firſt, that the Subject may have the grounds of the Sea to the low-water mark, and that no Cuſtome can extend the ownerſhip of a Subject farther.

2. That a Subject cannot have the grounds to the low-water mark, but by cuſtome and preſcription, and I take it that it is very diſputable whether grounds before they be relinquiſhed by the Sea, may be gained by Charter and grant from the Crown; I ſuppoſe they may.

3. That the words *incrementum & decrementum maris* are fully deſcribed by the ſaid Record of 43 *E.* 3. of the *Abbat* of *Ramſey*: that is, That if the decreaſe of the Sea be by little and unperceiveable means, and grown onely in long tract of time, whereby ſome addition is made to the Frontagers grounds, theſe by theſe words may appertain to the Subject; and herein the ſaid words have no other operation, but Lands left to the ſhore by great quantities, and by a ſudden occaſion and perceiveable means, accrew wholly to the King.

That

4. That the increaſe to the ſaid County Palatine, for the cauſes aforeſaid, doth appertain to the Prince as Earl of *Cheſter.*

The Shore.

BUT now I am arrived at the continent, and the firſt ground I ſet my foot on is the ſhore, which in *Latine* is called *Littus Maris*, it taketh the name wholly from the Sea, as partaking moſt with her nature, and ſo *Ex digniori parte appellatur*; yet it is not all one with the Sea, nor with the Land, but participates with them both: And Mr. *Bracton* in his ſecond Book, *Chap.* 12. ſaith, That *Littora Maris acceſſoria*, what the ſhore is appears by *Juſtinian* the Emperour in his *Inſtitutes*, *lib.* 2. *pag.* 141. and is there thus defined, *Littus Maris eſt quouſque maximus Hibernicus, & jus fluctus eluderet & quouſque fluctus Maris in eſtate longius exeſtuat*; and with this agreeth *Cicero Topicorum*, *The ſhore is not counted for lands or grounds gained from the Sea, or left by it, becauſe at every full Sea it is covered with the waters thereof.* In the 13th Chapter of *St. Matthew*'s Goſpel, ver. 2, 3. it is ſaid, That our Saviour *Jeſus* went into a ſhip, and ſate there, and the whole multitude ſtood on the ſhore, and he ſpake unto them: Hereby it appears, that the ſhore was the dry land, becauſe they ſtood thereon; and it was a great quantity of ground, for thereon ſtood a multitude, and it was near the brink of the water, becauſe they heard *Jeſus* ſpeak unto them out of the ſhip. In point of property and ownerſhip it is the King's, as Lord of the Seas; but as Sir *Henry Conſtable*'s Caſe is, a Subject may have the ſame, as belonging to his Manor by preſcription. In the Imperial Law which the Civilians uſe, the Sea ſhore is held to be common to all, and that it is as lawfull for *Diogenes* the poor Cynick, as *Cræſus* the rich King, *Caſam.* 161. *Ponere & retia ſiccare*; but our Commonlaw of *England* doth in reaſon much ſurpaſs either the Imperial Law or the Civil Law, in diſtinguiſhing upon theſe; for it is ſaid, *Rex in ea habet proprietatem*

Bracton.

Juſtinian.

Cicero.

Mat. 13. 2, 3.

ſed

ſed populus habet uſum ibidem neceſſarium: ſo that as to the lading and unlading of Ships, and for drying of Nets there, and for other neceſſary buſineſſes, the Subjects have theſe uſes therein, but the ſoil and grounds thereof belong properly *dom' Regi.* And a Subject may have the ſame by preſcription, and therefore ſuch as hold the ſhore to be the extreme point both of Land and water be in a great error, for as *Juſtinian* ſaith in his *Inſtitutes, Quod gemmæ & lapilli precioſi inveniuntur*, which can be taken no otherwiſe *ſed ſuper terram aqua relictam:* ſo that this ſhall ſuffice to have ſaid concerning the Sea ſhore.

Sea Coaſts.

THE coaſts of the Sea come next in order to be treated of: *Coſtera maris* be words well known, but their confined definition is hard to be found out; yet certainly they contain the ſhore and banks, for by the Statute of 27 *El. Chap.* 24. an Act was made for the mending of the banks and Sea works on the Sea Coaſts; but in the 7th. *Chap.* of *Maccabees* Coaſts have a larger extent, for there *Demetrius* Son of *Seleucus* departed from *Rome*, and came to a City of the Sea Coaſts; here a whole City is ſet on the Sea Coaſts: and in *Juſtine* treating of *Alexander* the great, it is reported of him, that he entred into *Lycia* and *Pamphilia*, and won and conquered all the Sea Coaſts: this could be taken for no leſs than whole Countries; for *Alexander*'s great mind and huge Army, could not march on a Mole-hill, or ſmall tract of ground: In St. *Mark. Chap.* 7. it is thus written, *That Jeſus departing from the Coaſts of Tire and Sidon, came to Galilee*, ſo that it may thereby be gathered, That theſe Coaſts were near the Sea, for our Saviour was no ſooner out of the Coaſts but he was on the Sea, which ſhews that Sea and Coaſts be *contiguè Jacentia*, yet no certain definition can I find of the words *Coaſts of the Sea*, but by theſe and ſuch like deſcriptions; yet this I gather and collect thereby, that in reſpect of the whole World, a whole Kingdom lying next may be ſaid to be a Sea

27 Eliz. 24.

Maccabees 7.

Juſtines.

Coaſt,

Coaſt, and a whole County in reſpect of a Kingdom; and in my opinion the next Town and Territories thereof lying next to the Seas, be in our Law taken to be the Sea Coaſts and no other; and therefore ſome do much err which take Coaſt to be the edge of Land next the water, and ſhore to be the brinks of the water next the Land *quaſi duo oppoſita.*

And becauſe Creeks, Havens and Ports be all of them within the charge of this Law, and this Statute was materially made in defence thereof, and as they differ in appellation, ſo they vary in definition, yet they do in ſome things agree in the material; I will therefore deliver my opinion of them.

Creeks.

CReeks of the Sea is an Inlet of Sea cornered into the main Land, ſhooting with a narrow paſſage into ſome Angle of the Land, and therein ſtretching it ſelf more than ordinary into the Land, and ſo holdeth not even quarter with the Levant Sea; and ſuch Creeks or Inlets we commonly term in the Law to be Arms of the Sea: for like as the Arme of a man ſhooteth out from the Body, ſo by a metaphor the inlet or corner of the Sea let into the Land, is called an Arm of the Sea; and although it go far into the land, yet the points of Land on both ſides may well be diſcovered: and this appears in that great Arm of the Sea on *Humber*, where it runs betwixt *Lincolnſhire* and *Yorkſhire*, the points of either County may be ſeen at once, and ſeem to ſtand even over the one to the other.

Arm of the Sea.

AND an Arm of the Sea is ſaid to extend into the Land ſo far as the flow and reflow goeth: In the Patent of the Admiral of *England* I find this word *Creek* uſed; for there the King granteth to him *omnia bona mercimonia & Catalla in vel ſuper Mare littora crecas & Coſteras Maris*, but it differs

differs much both from the ſhore and coaſt; for a ſhore is ſometimes dry Land, and ſometimes water, a Coaſt is always dry Land, but the Creek is always Sea and new Land: In the Statute 28 *H.* 8. *Chap.* 15. *Raſtals* Piracy, *A.* It is that all felonies, *&c.* done upon the Sea, Haven or Creek, where the Admiral hath Juriſdiction, ſhall be tried in ſuch County which the King ſhall appoint; by the Statute it is manifeſt that the Creek is not all one with the Sea, nor the ſame that a Haven is, by the Statute made in the 4 *H.* 8. *cap.* 20. *Raſtal* Merchants, 5. appoints that all Merchandizes entring in or going out of the Realm of *England*, ſhould be charged and diſcharged in great Ports, and not in Creeks or ſmall arrivals; by which Statute it is apparent that a Creek is not all one that a Port is: But yet here it ſeems to be an Inlet of the Sea where Ships may have their arrivals, as at *Foſdyke*, *Stow*, *Wainfleet*, and ſuch like; and I take it that a Bay and a Creek be all one, and that a Mere and a Fleet be alſo of that nature, and that all theſe rather vary in words than in matter.

28 *H.* 8. c. 15.

4 *H.* 8. c. 20.

Diverſity between the Shore.
A Coaſt.
A Creek.
Creek.
Bay.
Fleet and Mere.

A Port.

A Port is a harbor and ſafe arrival for Ships, Boats, and Ballengers of burthen, to fraught and unfraught them at, as by the ſaid Statute of 4 *H.* 4. appeareth: In the *Iriſh Reports*, *Fol.* 56. Ports be ſaid to be *Oſtia & Januæ Regni*; I take a port to be ſome ſpecial place in ſome great Borough, where arrival of ſhips be, as the Cinque Ports, which be *Dover*, *Sandwich*, *Rye*, *Rumney* and *Winchelſey*; the moſt famous in this Realm, and theſe be places of great privileges: and *Boſton*, *Hull*, *Lyn* and *Plymouth*, be alſo Ports and Port Towns, where there are ſpecial Offices and Officers belonging to them, touching Merchants and Merchandizes: And the ſaid Statute of 4 *H.* 4. directed that Merchants ſhould be charged and diſcharged at great Ports, was for that there were Officers for the King, deputed to receive His Highneſs's Cuſtoms and profits thereupon ariſing; hereupon came that Officer called

Hollingſhead.
Cro. p. 120. 6.

led Portgreve, which ſignifieth the Governour of the Port, as Mr. *Cambden* noteth *page* 244. the difference between a Creek, a Haven, and a Port, be theſe;

Cambd. 244.

Diverſity between a Creek, Haven and Port.

A Creek is a corner of the Sea let into the Land farther than ordinary, and more than the Sea is, but it is no uſual or accuſtomed place of arrival for ſhips; and commonly it hath neither ſafe harbor nor legal privilege.

A Haven is properly a ſafe place of harbor for ſhips, but may be without any privilege at all, of which kind I know ſome.

And a Port is not onely a ſafe harbor for ſhips of the greateſt burthen, but it is alſo always graced with legal privileges; and this appears ſo by the Statute of *Magna Charta*, cap. 9. *Quod omnes Communitates & Barones de quinq; portibus & omnes alii portus habeant omnes libertates & liberas Conſuetudines*, which proveth my former definition of Ports to be true.

Magna Charta, cap. 9.

After all theſe definitions and diſtinctions, I have now prepared my Caſe ready to receive his cenſure upon the laſt concluſion; that is, That all the ſaid grounds were within this Statute, but no part thereof within this Commiſſion of Sewers: and therefore it is firſt to be noted, That theſe grounds were left by the Sea ſince the awarding of this Commiſſion, and the words of the Preamble of this Statute ſpeak of grounds heretofore won; which words (*Heretofore won*) ſeemeth to tie the Statute and Commiſſion, both to grounds left or won before the ſaid Statute, and not ſuch as be won after, like to the Statute of *Weſt.* 2. *de Donis conditionalibus quod ad dona prius facta non extenditur*, which excludeth out of that Statute all gifts made before. And the words (*Heretofore and hereafter*) are words of conſequence in point of time; and whereſoever they are ſpoken, they come with an *Emphaſis*, as if they required expreſs obſer-

obſervance; and ſo is the Statute of 32 *H.*8. *cap.* 28. of Leaſes, that Statute is of all Leaſes hereafter to be made by Tenant in tail, with ſuch cautions and proviſo's as be limited and ſet down in that Statute, ſhould be good: But Leaſes formerly made, though all the proviſo's in the ſaid Statute were obſerved, were notwithſtanding by reaſon of the ſaid word *Hereafter* out of the relief of that Statute. 32 *H.*8. *c.*28.

And ſo in the Statute of *Will's* 32 *H.* 8. which had theſe words in it, *All perſons having Lands, or which hereafter ſhould have, might deviſe*; this did not make good any deviſes of Lands made before: but if this ſhould paſs for current, then I ſhould not perform my word in my concluſion, which puts it all within the Statute; and this exception, if it were material, would not put it onely out of the Commiſſion, but the Statute alſo; yet notwithſtanding though the conſtruction made of all the ſaid former Statutes, ſtand with Law, by reaſon of the ſaid words *(Heretofore and hereafter)* yet in this Statute of Sewers, the ſame be not material, neither be the ſaid words *(Heretofore won)* to be preciſely obſerved, becauſe they be placed in the Preamble of the Statute, and not in the enacting part of the Law, as in the ſaid former Statute they were: And expoſitions are not tied to Titles and Preambles, which many times comes ſhort of the parts of the Law, but to the Body and enacting part of the Statute, which is the matter and ſubſtance: And hereupon the Statute of 21 *H.*8. *cap.* 15. of Leaſes recites in the Preamble thereof, *That whereas divers Leaſes had aforetime been made for Incomes and great Fines, and yet after the Leſſors did ſuffer Recoveries, if at this day a Leaſe be made, and that without Fine or Income, yet ſuch a Leſſee ſhall be received to falſifie the recovery had againſt his Leſſor notwithſtanding:* The Preamble of that Statute ſeems to remedie no Leſſees, but ſuch as made Fines and were made before that Statute, but the ſaid words were not put in the Body or enacted part of the Statute: And ſo it is in our Statute; the words *(Heretofore won)* be onely put in the 32 *H.* 8. *c.*1. 21 *H.* 8. *c.* 15.

preamble and not in the material part of the Law, and ſo the Expoſition is not to be tied hereto; ſo notwithſtanding this Exception, theſe grounds though gained ſince the Statute, are within the relief thereof.

The ſecond cauſe wherefore theſe new grounds ſhould not be within this Law, is, Becauſe theſe Lands be increaſed beyond the bounds ſince the making of theſe Laws, and ſo it may be alledged that they cannot extend to the new inlargement: for Mr. *Plow.* in his *Com. fol.* 129. ſaith, *That Laws and privileges tied to a certain Place or Precinct, cannot be extended or inlarged beyond the ancient Bounds, although the Precinct be inlarged.* As the Caſe in 7 *H.* 6. *fol.* 32. where in a *Nativo habendo*, a Villain had remained a year and a day in *London*, which was ancient Demeſn, and there was a privilege, that every Villain and Bondſlave which had remained a day and a year in *London*, the Lord might not ſeize him; and the Villain pleaded that he had remained a year and a day there, and ſo took himſelf to be within that privilege; but becauſe ſince the ſaid liberty granted the Bounds of *London* were much increaſed, therefore it was there held, that the ſaid liberty and privilege did not extend to the new inlargement. And the Caſe is alſo put in the ſaid *Comment.* that the Biſhop of *Durham* had divers liberties in his Lands lying between the two Rivers of *Tyne* and *Teſe*, and after he purchaſed other Lands there, the ſaid liberties did not extend to the ſaid new purchaſed Lands; and the like Law is if one have a Warren in his Manor and Lands in *Dale*, after he purchaſe more grounds there, his Warren doth not extend unto them. And ſo where one had by Charter the Lands of perſons forfeited for Treaſon, he could not have by the ſaid ancient Charter, Lands forfeited for Treaſon by Tenants in Tail, becauſe the Forfeiture of them was given by a late Statute ſince the Charter, but *his non obſtantibus*, I am of Opinion, That this Statute I now treat on extendeth to theſe new gained grounds: and I take a difference between a ſpecial Law of Privileges, and Liberties which is ſtin-

Plow. Com. fol. 129.

7 *H.* 6. f. 32.

ted

ted or bounded either by Statute, Charter or Cuſtome, the ſame can by no conſtruction be made to exceed the Bounds; but the general Law of this Kingdom, as this Law of ours is, the Extents thereof be as large as the whole Realm is, and they be not tied to ſtinted Limits, as particular private Charters and Cuſtomes be; and ſo I conclude, That in point of Extent, this Statute of 23 *H.* 8. is tied to no other Bounds than to the Kingdom of *England.*

Diverſity between Grounds gained and Grounds left.

THE third matter is that which I have grounded the concluſion of my Caſe upon, and that is, Whether the grounds in my Caſe newly left by the Sea to the ſhore, and the Shore be ſuch Grounds as be within this Commiſſion; And in my Opinion they be not: And therefore to maintain my Opinion herein, I take a difference between Grounds left by the Sea, and Grounds gained from the Sea; for Grounds left are of no value, and bring forth no Fruit or encreaſe at all, but the uppermoſt part thereof are Sand, which theſe Laws take no hold of; for the Commiſſion extends onely to Grounds won and made profitable for the Commonwealth of this Realm, which *Terra relicta* yields not, for no profit at all thereof ariſeth, till the Sand be inned and gained; and theſe Laws made the Commiſſioners *Savers* and not *Gainers*, and therefore did extend the Commiſſion but to the uttermoſt Banks and Walls, and left the Shore as Grounds poſſeſſed by the Sea, and ſo be put *pro indefenſo* by this Law; and therefore I do make my Concluſion as followeth:

First, That the Seas, Creeks and Bays are all within this Statute in point of extent; but that they and the ſhores, and the relinquiſh'd Grounds, be all of them out of this Commiſſion of Sewers to be dealt withall thereby.

Secondly,

2. Secondly, that Ports and Havens are totally, the Waters, as well as the Walls and Banks thereof, within the Commiſſion of Sewers.

3. Thirdly, the ſhore and grounds left by the Sea when they are put as in Gainage, are then and not before within the power of the Commiſſion of Sewers.

4. Fourthly, although the Grounds left by the Sea are not in point of defence within the Commiſſion of Sewers, yet a Wall or Bank may be thereon raiſed for the aid and ſuccor of the Countrey, but not for any cauſe where the defence extends but to themſelves. And although Grounds have been gained from the Sea in the County of *Lincoln* and elſewhere in this Realm, yet that was done at the labor of private men, and not by the Commiſſion of Sewers, which aims at the general good, and not at private Commodities.

So that *Super totam materiam*, I am of Opinion with the concluſion of my Caſe, that is, That the ſaid new Iſland is the King's, the grounds left to the ſhore pertain to *C.* the ſubject; and that becauſe they are all of them within the Realm of *England*, they are therefore within the extent of this Statute: But in regard they are Grounds left onely, and not gained nor made profitable for the Commonwealth of this Realm, they are not therefore within this Commiſſion. And ſo I conclude my Argument as I did my Caſe: in which, I hope, I have neither injured the Subject in his private Inheritance, nor wronged Prerogative in any point.

Finis Primæ Lecturæ.

Initium

Initium Secundæ Lectuæ.

FOraſmuch as the firſt day I went perambulation about the Sea, and of all which belong to her Empire and Dominion; wherein I did ſurvey her Bounds, her Qualities and her Government: Now I do intend to go a Progreſs through the Land, and to take a view of the fair goodly Rivers, which make their voyage to the Sea, for theſe my Statute hath taken into her protection. And this ſecond day I purpoſe to call a Court of *Oyer* and *Terminer*: And I do intend, with your gentle patience, to examine all the particulars there ariſing. And becauſe the ſaid Statute of 23 *H.* 8. muſt be my chief guide to direct my faireſt paſſage through theſe uncouth ways, I will pray aid thereon; and I will now proceed to declare what buſineſs on Land this Law hath undertaken to defend, and what offences it purpoſeth to reform: And accordingly the ſaid Law doth diſtribute it ſelf into theſe particular Branches:

First, Into matters of defence this Statute maintaineth, are theſe following, *viz.*

1. Walls.
2. Banks.
3. Ditches.
4. Gutters.
5. Sewers.
6. Goats.
7. Calceys.
8. Bridges.

II.

Secondly,

2. Secondly, Into matters of Offence which this Statute termeth Lets, Impediments and Annoyances which are to be put down or reformed, as cauſe ſhall require;
 1. Streams.
 2. Mills.
 3. Ponds.
 4. Fiſhgarths.
 5. Mildams.
 6. Locks.
 7. Hebbingweres.
 8. Hecks.
 9. Floudgates.
 10. Other like Lets and Impediments.

And to the end I might fully examine this part of the Statute which produceth theſe matters, I have framed a Caſe, which doth give occaſion in this days exerciſe to diſpute of all them.

The Caſe for the Second Lecture.

Second Caſe. A. Leaſeth his Manor in the County of *Lincoln*, in which be Copyholds, to *B.* a younger Son for his life, upon Condition to have it for the life of *C.* upon Condition to have it to him and the heirs of the body of his Father. A Copyhold is forfeit, the firſt Condition is performed, the Commiſſioners of Sewers in that County upon view ſurvey, and by their diſcretion decree a new bank where none was before to reſiſt the Sea, and a new River to be cut to drain the ſuperfluous waters in *S.* and an old Sewer in *D.* to be repaired; and by Inquiſition aſſeſſes *B.* the Leſſee for the Manor, the Copyholder for the Copyhold Land, and the Town of *S.* and alſo the Parſon there for his Tythes, becauſe they lie all in the Level; the ſecond condition is performed, *B.* enters in the Copyhold.

My concluſion is, That this new Bank, new River, and old Sewer be well decreed, but the ſaid Seſs is void *in toto & in qualibet parte.*

Points

Points at the Commonlaw.

The Points of this Caſe are three at the Commonlaw, and three upon the Statute; but all of them are ſo woven within another, that every one of them go hand in hand from the beginning to the end of the Caſe.

Imprimis, Whether the Duplicate Condition be good, or not? 1.

Secondly, what Eſtate *B.* the younger Son hath by the firſt Condition, and what Eſtate he hath got by the ſecond? 2.

Thirdly, a Copyhold becomes forfeit to the Lord, and before the Lord take advantage of it his Eſtate is changed, Whether by the change of his Eſtate the benefit of the forfeiture be loſt, or not? 3.

Points upon the Statute.

Imprimis, Whether Commiſſioners have power to decree a new Bank, a new Drain, and other new defences, or not? And herein the qualities and properties of Rivers, Streams and Banks, and their dependants, are to be treated of. 1.

Secondly, Whether they may decree the ſaid new Defences by view and ſurvey? And herein is to be handled, What Commiſſioners of Sewers may do by ſurvey, and what they may do by their diſcretion, and what they may do by Jury. 2.

Thirdly, in what Caſes Aſſeſſes and Taxes may be laid and impoſed, and on what things, and in what manner they are to be impoſed; and whether the Rates ſet upon the perſons in any caſe be well done or not, and where the fault is if any be. 3.

Argumentum Lectoris.

Seeing it hath been the ancient order for the Reader of this place to maintain the Concluſions of his Caſe, I ſhall therefore endeaver my ſelf to perform that order which Cuſtome hath impoſed upon me; and accordingly as I have concluded, ſo I take the Law to be.

And touching the firſt Point, it hath been challenged and drawn in queſtion upon ſome Opinion delivered in the Re-

Sir *Ed. Cook's* 1 Report. ctor of *Cheddington's* Case in Sir *Edward Cook's* first *Report*; where it's said, *That one contingent cannot depend upon another:* But more strictly it is called to an accompt in the Lord *Staf-*

Cook, Rep. 8. *ford's* Case, in Sir *Edward Cook's* eighth *Report*; for there it is held, *That one possibility cannot depend upon another possibility*; and this Case is there put, *That if* A. *let Lands to* B. *for years upon Condition to have it for life, and upon Condition to have Fee, that the Fee simple can never increase by the second Condition*; but as he saith in another Case, *Amicus Plato, Amicus Socrates, sed magis amica Veritas*, his rule taken in the first Case is very general, and the Lord *Stafford's* Case admits distinctions, which in my Argument I shall apply my self unto.

And some differences I shall take in this Point in question; therefore I shall thus distinguish, That if upon performance of the first Condition, the Original Estate be determined upon which both the first and second Condition were built and grounded, the second Condition and increase thereupon is utterly void; but if the first Estate be not destroyed nor confounded upon the first Condition performed, the second Condition and Estate thereof which shall be gotten thereby, may then well grow upon the old stock. To explain this by Example, If *A.* give Land to *B.* in Fee simple, upon Condition to have the Land in Tail, upon Condition to have for life; here because the first Estate and Livery by the first Condition is not destroyed, therefore the second Condition should well stand in force. So I do make a Lease to *A.* for twenty years, upon Condition to have the Land for forty years, upon Condition to have Fee; this first Condition and second Condition may have both their full Operations: for by the performance of the first Condition, the Lease of twenty years is not destroyed, but stands on foot; and therefore the original Estate remaining unconfounded, the Fee simple may well increase by the performance of the second Condition: But if a Lease be made to *A.* for his life, upon Condition to have in Tail, upon Condition to have Fee; the second Condition here

here is utterly void, becauſe by the performance of the firſt Condition, *A.* had an Eſtate in Tail, which drowned and deſtroyed his Eſtate for life; and ſo becauſe every decreaſing and increaſing Eſtate is to depend upon the firſt Eſtate which receives the Livery, which is the life of all, therefore the Second Eſtate can never accrew in this Caſe: and this is the true reaſon, as I take it, of the ſaid Caſe put in the Lord *Stafford*'s Caſe; for there the leaſe for years was deſtroyed by the Leaſe for life, which came by the firſt Condition, and ſo the Fee ſimple there could never accrew by the ſecond Condition. And in anſwer to the ſaid general ground taken in the Rector of *Cheddington*'s Caſe, *That one contingent or poſſibility cannot depend upon another*; under favour I take it, not that I am bound thereby, neither was it the meaning of Sir *Edward Cook*, as I take it, to extend the ſame ſo largely as they are there put, becauſe I find many Authorities of great account which are againſt the ſaid general poſition.

Lord *Staford*'s Caſe.

Rector *de Cheddington*'s Caſe.

And firſt in the 38 *H.*8. *Br. Feoffments, pl.* 71. a Feoffment was made to the uſe of *A.* and his heirs, untill *J. S.* paid him Ten pounds, and then to *J. S.* and his heirs, and ſo to the third perſon; and what is this but one condition, contingent and poſſibility to depend upon another, for theſe contingents there were held good, and were built upon a ſure foundation.

38 *H.* 8.

And ſo in *Digge*'s Caſe in Sir *Edward Cook*'s Reports, where a Feoffment is made to the uſe of *A.* and his heirs, with power of Revocation, and after of new Limitation of Eſtates; theſe be alſo contingents and poſſibilities depending upon others, and many ſuch double contingents may be put.

Digge's Caſe.

The Caſe of Sir *Edward Cook* put in the end of the Rector of *Cheddington*'s Caſe out of 12 *Lib. Aſſ. pl.* 5. in my opinion doth not diſallow the ſecond Condition; for there the Caſe is, *That* A. *Leaſed to* B. *upon Condition, That if* A. *or his heirs pay to* B. *Ten pounds within a certain day, that they might re-enter; and if* A. *nor his heirs ſhould not pay the Ten*

12 *Lib. Aſſ.*

pounds within the time; Then if B. *paid to* A. *Ten pounds at another day, that he ſhould have Fee: Both* A. *and* B. *failed in payment, and* A. *entred, and being put out, brought an Aſſize, and* nihil Cepit per breve; this doth not prove that one condition cannot depend upon another, neither can I ſee well what Expoſition to make of ſo uncertain a Caſe, ſo that I take this Caſe to be no evidence againſt mine.

14 *H.8. f.*15. But in the 14 *H.* 8. *fol.* 15. there is a Caſe which in my opinion makes more againſt my double condition than any other, which is put by *Brudnel* Chief Juſtice; that is, If *A.* be bound in an Obligation to *B.* upon condition to infeoff *J. S.* before *Eaſter* enſuing, then the Obligation to be void; and if he do not infeoff him, then to pay Ten pounds at *Pentecoſt*, then the Obligation to be void; The Feoffment is not made before *Eaſter*, therefore *Brudnel* held the Obligation was forfeit, and that the ſecond Condition was not good: But there is a *(Quære)* ſet upon that Caſe, and ſo it may well be, for I ſee it commonly done, that if a defeſans be made of a Statute which is broken, and ſo the Statute becomes forfeit, yet a new defeſans may defeat it; and ſo in my Opinion may the ſecond Condition in this Caſe avoid the Obligation, if the firſt concluſion had not been in the Caſe.

A Conceit. I ſhall add this Caſe alſo as a conceit; that is, *A.* infeoffs *B.* upon condition, if *A.* go to *Lincoln* he ſhall have the Lands to him, and the heirs of his Body, and if he go to *Boſton* he ſhall have it for Ten years: and he goes firſt to *Boſton.*

I do here hold theſe Conditions being put promiſcuouſly, without diſtinction of the times of the Conditions which ſhall be firſt performed, and which the ſecond, that the Fee is decreaſed into an Eſtate for years, and can never increaſe into an Eſtate in tail by performing of the ſecond Condition, becauſe the Livery out of which it ſhould grow was quite deſtroyed by the firſt decreaſer. So that my intent appears, that one Condition may depend upon another upon the ſaid diſtinction; but whether by the performance

Second Point.

of

of the first Condition in my Case there will an Estate come to *B.* or not, I meant it for a question: for *B.* had before an Estate for his own life; then is it not possible that his Estate can hereby be increased by having the Land also for the life of *C.* if it be admitted *argumenti gratia,* that *B.* shall or may have both these Estates stand in him both at one time: for if *C.* dyed first, then is *B.* never like to have any benefit thereof; And if *B.* himself should die before *C.* then also were it impossible for *B.* to make any use of this Estate for the life of *C.* unless it were in him to grant away to another, as in the Case of the Office in the 1 *H.* 7. where an Office is granted to the King, the King could not have the Office himself; and so in that point for the King to take by the grant, he could not, yet by that Book it was in him to grant over to another which might have it. And like to this is the Case where *J. S.* is Parson of the Church of *Dale*, and the Patron grants the next avoidance, this grant can he himself take no benefit by, unless he resign, yet if he die it shall come to his Executors. 1 *H.* 7. 29. *Croft's* Case.

But I take the Law to be in my Case, that *B.* shall not by the first Condition have both the Estates in him at once, that is, for his own life, and after for the life of *C.* but that the Estate of *B.* by the first Condition, shall be decreased or changed from his own life into the life of *C.* and shall be melted and newly molded by this Condition; for an Estate may as well decrease as increase by a Condition: and yet the Lord *Stafford's* principal Case was; *That Queen* Elizabeth *did grant the Manor to* Tindal *and the heirs of his body, upon Condition upon payment of Twenty Shillings to her by* Tindal, *that he should have the Reversion to him and his heirs*; and there it is holden for Law, that by the payment of Twenty Shillings, the Reversion in Fee Simple shall increase to *Tindal*, and shall not alter or drown the Estate Tail, which is an excellent Case; but alter the putting of that Case, and then it may alter the Law also, that is, I give Land to *J. S.* and the heirs of his body, upon Condition if he pay me Twenty Shillings, that he shall have the said A Conceit.

ſaid Lands to him and his heirs: In my conceit by the performance of this Condition, the Eſtate Tail, is by increaſe changed into a Fee Simple; in which, note the difference between *Tindal*'s Caſe and this, where upon payment of 20 *s.* the Reverſion is granted to him and his heirs: and where the words be, *That upon payment of Twenty Shillings he ſhall have the Lands to him and his heirs:* In the firſt Caſe, the Fee Simple accrewing ſhall not alter the Eſtate Tail, but in the ſecond Caſe, by the Fee increaſing, the Eſtate Tail is determined and changed into a Fee Simple, *quod quære.*

Admitting the firſt Condition did increaſe the Eſtate of *B.* from his own life to the life of *C.* and the ſecond condition is performed, by the which another Eſtate will accrew to *B.* as I take it will, becauſe an Eſtate decreaſed, is parcel of the firſt Eſtate; than what Eſtate *B.* hath got by this new Limitation, is the queſtion: And in my Opinion, he hath at the moſt but gotten an Eſtate again for his own life, and that the Limitation to the heirs of the body of his Father is utterly void, be his Father dead or alive; for if his Father be dead, his elder Brother is the heir of his body, within theſe words of Limitation, who cannot take the Lands by deſcent from *B.* his Brother, or from his Father; but as the Caſe is put in *Littleton*'s Title *Tail*, and in the 4 and 5 *Ph.* and *Ma.* in *Dyer*, *Greſwold*'s Caſe, where Lands were given to the eldeſt Son, and the heirs of the body of his Father; this is a good Eſtate in Tail, being made to the eldeſt Son, becauſe he is capable to take the Lands in both degrees.

Littleton. Eſtate-tail. 4 & 5 *Ph.* & *Mar. Dyer* 156.

(Although about the duration of ſuch an Eſtate Tail, there hath been a queſtion, *viz.* whether if the eldeſt Son die without Iſſue, his Brother ſhall inherit by force of this intail, or the Lands ſhall revert to the Donor. *Dyer ſupra. Leonard* 2. Caſe 29. *Roſſe* and *Morrice*'s Caſe.)

And

And in 2 *E.* 3. the Caſe is famous, and is known by the name of *Roberges*'s Caſe, where Lands were given to her and to the heirs of the husband of her body begotten; and it was there held, That if her husband were then dead, and left any heir which he had by her, they might take jointly with her; for that it was not poſſible to take by deſcent from the ſaid *Roberges*, becauſe he which takes it muſt not be heir to her, but to the husband, who never held any Eſtate therein: And ſo to be ſhort, I am of Opinion, That no Eſtate of inheritance be gained by *B.* by theſe words, *The heirs of the body of his Father.* 2 *E.* 3.

The Caſe upon the third Point is this, a Manor is granted to one for his life, upon condition to have it for the life of *C.* then a Copyhold is forfeit, and before the Lord ſeize, his Eſtate is altered or changed; if now he can take advantage of this forfeiture or not, wherein the altering of the Eſtate of one to another is of like force, as where it alters in the Partie's ſelf, againſt which it may be ſaid, *That if Tenant for life make Waſte, and then he in the Reverſion, grant over the Reverſion, the Grantee ſhall not now puniſh this Waſte.* Third Point.

And it was reſolved in the Caſe of *Chamberlin* and *Drake*, *Mich.* 1657. that the ſucceeding Lord of a Manor, ſhall not take advantage of waſte done in the time of the preceding Lord. *Siderf.* 2, 9.

And ſo Mr. *Perkins*, fol. 20. *If a Tenant alien in Mortmain, and then the Lord grant away his Seigniory, the Grantee ſhall not enter for this Mortmain:* ſo by *Fitz.* in his *Nat. bre.* in his *admeaſurement* of Dower, *If a Guardian aſſign to a woman more dower than ſhe ought to have, and then grant his Guardianſhip over, the Grantee cannot have an admeaſurement of Dower againſt her:* and ſo *Bingham*'s Caſe in Sir *Edward Cook* 2 *Rep.* where there was Tenant for life, remainder in Fee of a Tenancy holden by Knights ſervice, and he in remainder died, his heirs within age, and then the Lord granted away his *Perkins*, *f.* 20. *Fitz. Har. Nat. bre.* *Bingham*'s Caſe, *Cook* 2 Rep.

his Seigniory, and then Tenant for life died, by which the ſaid heir was to have been in ward; yet becauſe the Seigniory was granted away after the inception of the Wardſhip, before it was perfectly due, it was there held, that neither the grantor nor the grantee ſhould have the ſame: So Leſſee for life without impeachment of waſte, remainder for his own life, the privilege is loſt; but yet notwithſtanding, I do hold that in this Caſe *B.* after he hath by the performance of the Condition altered his Eſtate which he had when the forfeiture was committed; yet ſhall he afterwards take advantage thereof well enough: As if there be Tenant for life, the Remainder for life to *J. S.* and the firſt Tenant for life commit waſte or forfeiture, he in the reverſion cannot puniſh this during the life of him in the Remainder for life, but after his death he may; alſo if one make a Leaſe for years, upon Condition to be void, and the Leſſor grant away his reverſion, the Grantee may enter for breach of this Condition by 11 *H.* 7. 17. and yet here the Eſtate in reverſion is altered from one to another; and I doubt not, but if a Tenant for life, be the Remainder in Fee to another of a Manor, and a Copihold is forfeit, and then Tenant for life died, that he in Remainder may enter into this Copyhold; and yet this Eſtate is altered into a poſſeſſion from a Remainder; and in the Caſe, although the Eſtate in *B.* be altered, yet it is by decreaſer, and ſo thereby it is parcel of the old Eſtate he had before: and therefore it is like to a Caſe where the husband and wife were Tenants in ſpecial Tail, and they recovered by Aſſize, and then the husband died, and after his death without iſſue, the wife's Eſtate being altered from an Eſtate Tail, into an Eſtate of poſſibility of iſſue extinct, was again put out and diſſeiſed, and ſhe brought a Writ of Redisſeiſin, which will not lie but on the firſt Eſtate, and againſt the firſt parties, and yet it was maintained, becauſe it was parcel of her former Eſtate: And ſo in this Caſe, although the Eſtate of *B.* was altered from his own life into the life of *C.* yet I am of Opinion, That he might take advan-

Bokenham's Caſe in *Dyer.*

11 *H.* 7. 17.

2 *H.* 4. 17. & 26 *H.* 6. title *Aid, pl.* 77.

advantage of this forfeiture, becauſe the Cuſtomary Eſtate is utterly void thereby.

Points upon the Statute.

I am determined before I enter into the diſcourſe of new defences in my Caſe, to deliver my Opinion touching the Walls, Banks and other ancient defences, which have had their being time out of memory, and in truth be the very materials and memorials of Antiquity: And becauſe Banks and Walls be the firſt named in the Commiſſion, they ſhall therefore have the firſt place in my argument, being the moſt ancient and approved defences, as well againſt the rage of the Seas, as againſt the violence of freſh Waters, that either Art or Nature have produced.

Bank.

THE Bank of the Sea is the utmoſt border of dry Land, and is of the ſame materials with the grounds wherein and whereon it ſtandeth; it is ſometimes natural, and in ſome places artificial: Natural, as Mountains raiſed higher than other grounds adjoyning as it pleaſed the Creator, when the firſt huge *Chaos* was ſeparated, divided and diſtributed; Artificial, when it is caſt by man's hand. *Juſtinian* the Emperor treating of theſe in his *Inſtitutes*, and his title *de rerum diviſione* deſcribeth them in this manner, *Riparum uſus eſt publicus illar' verò domin' ad eos pertinet qui proximior prædiis domini ſunt, itaque naves ad eas appellere, funes arboribus ibi natis Religare, onus aliquod in his Reponere cuilibet liberum eſt,* by which authority it appeareth, that the ownerſhip and property of the Sea Bank and Banks of great Rivers, be to them whoſe grounds are next thereto adjoyning, and the Trees, Graſs and other things thereon growing, belong to the owner of the ſoil, but the uſe of the Banks is common to all the King's liege people, as to tie the ſhips and Boats to the Trees, and to tow them to and fro, and to lade and unlade their Merchandizes thereon, and for fiſhers to dry their Nets on. And as the owner of the ſoil

and proprietor of the grounds, cannot juſtify the digging or caſting of them down, whereby the people ſhall be hindred of their neceſſary uſe thereof, no more can the people which have but *neceſſarium uſum*, fell up the Trees, or mow the Graſs thereon growing, neither ought they to dig ballaſt there, but every one, as well owner as uſer, *Sic uti ſuo ut alienum non lædat.* I cannot more aptly compare a Bank of the Sea, or of a navigable River, than to a High-way, for that the property thereof is to him whoſe ground is next adjoyning, and the uſe thereof is common to all men, and the power thereof the King hath by His Laws, *Proprietas Domino, uſus populo, poteſtas Regi*: where-in for more clear Illuſtration of this matter, I put this Caſe, That *J. S.* doth cut the Sea Bank, or the Bank of a great River; and *J. B.* which hath occaſion to paſs thereby, falleth unawares into the cut, and is hurt in body or goods, the party which cutteth this Bank incurreth theſe mulcts: For firſt, the owner of the ſoil may have his Action of Treſpaſs, *quare ſolum fodit*, and he which fell therein may have his Action upon the Caſe againſt the digger of that cut, for to recover his damage for his ſpecial hurt; and the offendor may alſo be indicted at the King's ſuit for the general wrong done to the King's people: And the like Law is of a High-way.

Proprietas Domino, uſus populo, poteſtas Regi.

8 *E.* 4. 9.
27 *H.* 8. 27.
2 *E.* 4. 9.

A Wall doth differ in point of ownerſhip from a Bank, firſt, in reſpect of the materials the ſame is made on, for a Bank is made *Ex ſolo & fundo quæ ex ſuis propriis naturis ſunt eadem cum terra ſuper qua edificatur*, but ſo is not a Wall, for it is an artificial edifice, not of the materials ariſing of the place where it ſtandeth, but which be brought thither and built there, *ad propria onera & coſtagia partis*; ſo that the ownerſhip and property of a Wall doth appertain to him who is bound to repair the ſame, though his ground lie not next thereto; but of a Bank the property and ownerſhip is his whoſe grounds adjoin thereto: And this ſhall, I hope, ſuffice to have ſaid of Banks and Walls, the two firſt defences nominated in the Commiſſion of Sewers.

The

The letter of this Statute and Commiſſion, ſeem to extend onely to Banks, Walls and other defences ſtanding and being by the Coaſts of the Sea and Marſh grounds thereto adjoyning; but whether the Banks and Walls of freſh Rivers which have their courſes to the Sea be within this Statute or not, hath heretofore bred ſome queſtion; but for my own part, I am clear of opinion that they be within the proviſion of theſe Laws, for there be two miſchiefs recited in the Statute; the firſt is, for not maintaining the Walls and Banks againſt the Sea, by reaſon whereof great hurt hath happened thereby, by the overflowing thereof: and the other, by the inundation of freſh water-courſes through Land-flouds, which have done ſome damage to the grounds next adjoyning; and theſe Laws apply a remedy to both theſe grievances, that is, by repairing the Walls and Banks next the Sea, and by maintaining of the defences of the freſh Inland Rivers, to cauſe them to keep their Waters within their Chanels. And I take it there be words in the Statute that will bear this conſtruction, *viz.* That by the rage of the Sea, flowing and reflowing, and by means of the Trenches of freſh Waters deſcending, and having their courſes to the Sea by divers ways the Walls, Ditches, Banks, *&c.* be ſo dirupt, lacerate and broken, *&c.* And alſo in the preamble of the Statute the words there be, that by reaſon of the outragious flowing ſurges and courſe of the Sea in and upon Marſh grounds, and other low places heretofore through politique wiſedom won and made profitable for the great Commonwealth of this Realm, as alſo by occaſion of Lands, Waters, and other outragious Springs, in and upon Meadows, Paſtures and low-grounds adjoining to Rivers, Streams and Currents, wherein the Waters are to have their courſes. And what keeps the freſh Waters within this Chanel but good and ſerviceable Walls and Banks, and what things doth this Law intend to be dirupt, lacerate and broken, but the Walls, Banks and other defences which pent up their Waters? and theſe Words extend more properly to the Walls and Banks of freſh Inland Rivers than to Sea Coaſts. And I

do find ſome ancient Authority in the point out of the Charter of *Rumney* Marſh, *pag.* where the Words be, *ad diſtrictionʼ faciendʼ ad reparandʼ Wallia & watergaugia ejuſdem mariſci contra maris impetum inundationem aliarum aquarʼ dulcium*; which laſt words can have no other conſtruction or interpretation, but to extend the ſame to the Banks and Walls of navigable, and other freſh Rivers and Water-gauges of freſh Streams. And the Statute of 1 *H.* 4. *cap.* 12. makes the ſcruple clear wherein the words be, that the common paſſage of Ships and Boats in great Rivers of *England*, were oftentimes diſturbed by leaving of wears, *&c.* and provided a remedy therein; ſo hereby it is manifeſt that freſh navigable Streams are within theſe Laws.

Rumney Marſh.

1 *H.* 4. *c.* 12.

Private Walls and Banks.

BUT all Banks and Walls wherein Waters be pent are not within the proviſion of theſe Laws, but onely ſuch as belong to common and publique Rivers and Ditches, Sewers and Streams: for Walls and Banks made and erected as fences to mens private grounds, and there ſet or made to Ditches, Gutters and Streams, for the draining and watering of mens private grounds are not within theſe Laws, for theſe Laws take cogniſance and notice of none but of ſuch as tend to the good ſervice of the Common-wealth, and therefore whereas in the Ports of *Holland* in the County of *Lincoln*, and in other parts of this Realm, divers private perſons have for inning and ſafety of their Marſhes and Marſh Grounds, caſt great Banks for thoſe private uſes: theſe Banks are not within the protection and defence of theſe Laws to be maintained; but I am of opinion, That they may be extirped if they be letting and a hinderance to the common good of the Countrey where they be erected.

Foraſmuch as I am now in hand with Walls and Banks, the defences to Rivers, Sewers, Ditches and Gutters, I therefore take it, that it will hold good correſpondency here in

in this place, to treat of them and of their dependences. A River therefore is a running Stream, pent in on either side with Walls and Banks, and beareth that name as well where the Waters flow and reflow, as where the Waters have their current one way, as is expreſſed in the Caſe of the Piſcary of the *Banne* in *Ireland:* In the Statute of 4 *H.* 7. *Chap.* 15. *Thames* is termed a River: In 34 *Lib. Aſſ. pl.* 11. and in *Plow. Com. fol.* 129. *Tyne* and *Teſe* be both named Rivers: and in 19 *H.* 7. *Cap.* 18. *Severn* is ſaid to be a River; *Trent*, *Humber*, *Boſton* Haven, *Lyn* Haven, and *Tyber*, *Orontes*, *Euphrates* and *Auſidus*, near which *Hanibal* the *Carthaginian* General ſtruck the Battel of *Canna*, be all of them in Hiſtories of great authority named Rivers.

4 *H.* 7. 15. 34 *l. Aſſ. pl.* 11. *Pl. Com.* 129. 19 *H.* 7. 18.

Rennatus Choppinus in his Treatiſe *de Dominio Franciæ*, *Lib.* 1. *Tit.* 16. *de fluminibus*, ſaith, That *Fluminum duo ſunt genera, Regalia quædam, alia Bannalia ſive privata, Regalia dicuntur ex quibus princeps Jure patrimoniali vectigal capit, in quibus modum & tempus piſcationis conſtituit:* and Sir *John Davies* in his *Iriſh Reports* in the ſaid Caſe of *Banne*, ſaith, *That ſo far as the Sea doth flow and reflow, it is a Royal Stream, and the fiſhings therein belong to the Crown; but where the ſame doth not flow and reflow, And in all Rivers not navigable the* Tertenants *of both ſides*, de Communi Jure, *owe the River, and have the Piſcary; yet a Subject may have the free fiſhing in the Royal Streams by Cuſtome and preſcription:* And in the River of Thames *tam aqua quam ſolum pertinuit Dom' Regi*, and by Charter they were conveyed to the Lord Mayor of *London*, and Citizens of the ſame.

Choppinus.

So the Soil of all other Rivers, as high as there is flux and reflux of the Sea, is in the King, if no other claim it by Preſcription; *Siderfin* 1. 149.

Siderf. 1. 149.

In *Lib. Intr. fol.* 666. there is a preſident put in this manner, That an Action of Treſpaſs was brought *Quare le defend' piſcat' eſt in ſua ſeparali piſcaria & piſces inde, videlicet*,

In veteri lib. Int. fol. 666.

cèt, duos Salmones cèpit; the Defendant juſtified, and ſaid, That he was ſeiſed of the Manor of *Dale*, which doth extend it ſelf *uſque ad medium aquæ de* V. *quæ eſt eadem piſcaria in qua ſupponitur piſcationem predict' fieri ex auſtrali parte*, and that the Plaintiff *eodem tempore quo, fuit ſeiſitus de manerio de Dale quod ſe extendit uſque ad medium fili aquæ predic' ex boreali parte ejuſdem aquæ & quod ipſe defendens & omnes quorum ſtatum ipſe habet in predic' manerio de Dale, à tempore quo non extat memoria hominum in contrario ſeiſit' fuerant de predic' auſtrali parte de predic' aquæ ut de ſeparali piſcaria ſua:* in which pleading it appears, That the Lords on either ſide the River, owe the River by ſeveral moities, and the ſeveral moities and the ſeveral parts of the fiſhing as incident thereto.

Nat. br. fo. 123. P. C. 154.

It may alſo here, as I take it, be moved for an apt queſtion, in whom the property of running Waters was; for in *Natura Brevium, fol.* 123. there is a *quod permitt' habere liberam piſcariam in aqua ipſius* L. whereby it appears, That the Plaintiff had property in thoſe Waters; and in *Plo. Com.* 154. one granted *aquam ſuam in L.* and the Piſcary paſſeth thereby, and ſo did the ſoil alſo in my opinion: for

12 H. 7. f. 4. in 12 *H.* 7. *fol.* 4. a *precipe quod reddat* is brought *de una acra terre Cu' aqua Cooperta.* In my conceit the Civil Law makes prettier and neater diſtinctions of theſe than our Commonlaw doth; for there it is ſaid, That *naturali ratione quædam ſunt Communia ut Aer, aqua profluens, mare & litora maris:* I concur in opinion with them, that the Air is common to all; and I hold my former definitions touching the properties of the Sea and the Sea ſhores: But that there ſhould be a property fixed in running Waters, I cannot be drawn to that Opinion, for the Civil Law ſaith farther, *quod aqua profluens non manet in certo loco ſed procul fuit extra ditionem Ejus cujus flumen eſt ut ad mare tandem perveniat*; for in my opinion it ſhould be ſtrange that the Law of property ſhould be fixed upon ſuch uncertainties, as to be altered into *Meum, Tuum, Suum*, before theſe words can be ſpoken, and to be changed in every twinckling of an eye, and to be more

more uncertain in the proprietor, than a Camelion of his Colours. Our Commonlaw, which of all others is the moſt certain, did not ſet his property upon a Deer in Parks, Conneys or Hares in Warrens, nor on Fiſhes in running Streams; all which be more permanent than running Waters be: And therefore I am of Opinion, that taking this word *Aqua* for the bare running Water, there can be no property therein, but as the ſame is incident to the Soil, taking them two for one, it is drawn with the property thereof: and this difference is apparent by 12 *Henry* 7. afore ſaid; and Mr. *Linwood* puts a difference *inter Fluvium & flumen*; for ſaith he, *Eſt perennis decurſus aquar' ſed flumen eſt propria ipſa aqua.*

Let it not be held Queſtionable, whether Rivers of both kinds be within theſe Laws or not, though they be not put among the defences which this Statute ſpeaketh of; for that expreſly thoſe things which are termed Lets and Impediments, are commanded by this Statute to be removed out of the Rivers and Streams for hindring the Waters; and Navigation being ſo carefully provided for cannot be ſupported, unleſs Rivers Navigable be maintained: and theſe Rivers are like the veins of a man's Body, by means whereof the increaſe of the Grounds near thereunto adjoining are abundantly multiplied, and the Waters which trouble the Level are conveyed away thereby: ſo that I am clear of Opinion, that Rivers and their Chanels, Waters and Banks, are all of them fully within the defence of theſe Laws, howſoever ſome which would have no new Rivers caſt by the power of theſe Laws, would extend the words but to the repairs, and not to the River it ſelf.

Sewer.

A Sewer, whereupon theſe Laws took their name, hath been no great ſtranger to our Commonlaws of this Realm, being perfectly deſcribed, though not preciſely defined in our Law; ſome mincing the word, compound it of two words, *Sea* and *were*, ſaying, that *nomina ſunt conſonantia rebus*; and there is ſome coherence between the name and the nature of the thing. Authorities in Law will beſt decide
20 *H.* 6. *f.* 1. the queſtion, and therefore 20 *H.6. f.* 1. an action of waſte is brought there againſt Tenant by the courteſie, for ſuffering a Sewer in part of the grounds to be unrepaired, by reaſon whereof his grounds in *L.* which the Defendant held by the courteſie of *England*, were ſurrounded; ſo that by this book it is made manifeſt, that the Sewer is a freſh Water trench compaſſed in on both ſides with a Bank, and is a
12 *H.* 4. *f.* 7. ſmall current or little River. And in 12 *H.* 4. *fol.* 7. an Action of the Caſe was brought for ſtopping of a Sewer in *Dale*, by reaſon whereof the Waters did overflow the Banks, and drown the Plaintiff's Meadow Grounds: So theſe two Caſes ſufficiently declare what a Sewer is; and *Hollingſhead* in his *Chronicle* termeth the Fleet Dike in *London* a Sewer; and I am of opinion, That it is a diminutive of a River, and by expreſs words Sewers be within theſe Laws, *& ſic eſt* in 39 *H.* 6. 31.

Gutter.

A Gutter is of a leſs ſize, and of a narrower paſſage and current than a Sewer is; and as I take it, a Gutter is the diminutive of a Sewer: and the difference between them is, That a Sewer is a common publick Stream, and a Gutter is a ſtraight private running Water; and the uſe of a Sewer is common, and of a Gutter peculiar, and by expreſs words alſo a Gutter is within theſe Laws, *& ceo eſt ſic mention'* 39 *H.* 6. 31.

Ditches

Ditches.

A Ditch *Foſſa* is alſo deſcribed in our Books, as in 12 *H.*4. 7. where an Action upon the Caſe was brought againſt the Mr. of *S. Marks* in *Briſtol*, for that he was bound by the tenure of his Land to cleanſe a Ditch there; he did neglect to doe the ſame, by means whereof the Waters therein were ſtopped, and did thereby ſurround the Plaintiff's Grounds; ſo that hereby it is apparent, That a Ditch is a kind of current of Waters in *infimo gradu.* And Mr. *Cambden* in *Sua Lincolnienſi Hiſtoria* doth there deſcribe *Foſdike* to be *Foſſa incibis quam Henricus Primus per ſeptem milliaria à Withania in Trentum perduxit ut Lincolnienſibus ad ſubvehenda neceſſaria uſui eſſet*; this Ditch is at this day a current and paſſage for Boats of ſmall burthen in Winter, but in Summer none at all, though of late great ſums of Money have been expended thereupon, *Sed tamen adhuc nihil inde boni venit:* at the beſt it is the worſt in all that Countrey, and is of ſo ſlow a current *ut non videtur currere omnino:* It ſerves in many places for a fence to divide Lordſhips, and is a great trough to ſwallow up Waters thereabouts, which otherwiſe would lie upon the Level, and of it I ſhall ſay no more, but *Spero meliora & expecto.*

12 *H.* 4. 7.

Cambden.

Other famous Ditches there be, as that in the North-eaſt part of the City of *York*, which is in a manner a ſtanding Water: And there is an old forlorn Dike on the Fen ſides in the County of *Lincoln*, called *Caredike*, more ancient than profitable, for it doth, as many other of thoſe unuſual Ditches do, run croſs to the ordinary currents of Waters in thoſe parts: For where the Seas (for example) ſtand Eaſt from the main Land, and ſo the ordinary currents run all from Weſt to Eaſt directly towards the Sea, this runs North and South, obvious and croſs to the natural current of the Waters, which is the true cauſe wherefore their currents be ſo ſlow, ſmall or none at all. There is another of them on *Newmarket* Heath *quæ admiranda Foſſa vocat'* the Devil's

Dike: and in *Wiltſhire* there is a Ditch famous, called *Wanſdike*, or *Mercurii Foſſa*, which ſerves for a diviſion of Countreys, and ſo be *Foſſa Limitania*, and are either altogether dry Dikes, or contain commonly no more Waters than thoſe that fall into them: None of theſe Ditches be within theſe Laws, but ſuch of them which have a kind of current, and which in ſome ſort partake with the Rivers.

Pools.

A Pool is a mere ſtanding Water, without any current at all, and hath ſeldom or never any iſſue to convey away the Waters; but a Ditch hath no conſtant ſtanding, nor any apparent current: A Pool is properly the Inheritance of ſome private, but a Foſſe or Ditch is in uſe common. Pools be not within this Law for two cauſes; the one, becauſe both in property and uſe they be private and peculiar: The other is, becauſe theſe Laws ſeem to extend to grounds caſually, and not continually drowned *& ad ea quæ frequentius accidunt Jura adaptantur*; yet all Pools be not excluded from the helps of theſe Laws: for ſuch as adjoin to great Rivers, and lie upon the ſides thereof without diviſion, they are in a manner part of the Rivers; and of their kind are the two famous Pools called *Brayford* and *Swanpool*, both near unto the City of *Lincoln*.

Ponds.

A Pond is a ſtanding Ditch caſt by labour of man's hand in his private Grounds for his private uſe, to ſerve his houſe and houſehold with neceſſary Waters; but a Pool is a low plat of Ground by nature, and is not caſt by man's hand. I find a Pond within my Law I read on in *expreſſis terminis*, not as a thing defended thereby, but as a Let and Impediment: And had I not found him therein named, I ſhould not by any Expoſition have here brought it in amongſt the Water Inſtruments; for I much marvell what Impedi-

Impediment a Pond can be at all, unleſs by caſting of Trenches from the River to the ſame, it ſhall be a means to take thereinto ſome of the Waters of the River, and may thereby hinder Navigation; but this is far fetcht.

Streams.

STreams be not any of theſe, for all theſe have their proper peculiar Banks, Bounds and Chanels, and are put in amongſt them; but a Stream is properly a current of Waters running over the Level at random, and be not kept in with Banks or Walls, and ſo *Linwood* ſaith, that *Flumen* which is a Stream *nihil aliud eſt quam ipſa aqua.*

Conduits.

A Conduit or ought thereto belonging is not within theſe Laws in any ſort, whether it pertain to a private perſon, or to a Town or Corporation.

Springs.

SPrings I find within this Statute, but coupled with ſuch a word, that they thereby ſeem to be excluded and exiled quite from claiming any privilege of defence by theſe Laws; for the word (*Outragious*) being joined therewith, doth ſignifie the meaning of theſe Laws to take them to be hurtfull, and not helpfull; but all this cometh of the word *Outragious*, which being but a quality annexed upon accident, may upon juſt occaſion be taken away. And the word *Springs* of it ſelf is both in appellation and operation, very beneficial for the Commonwealth: for I may juſtly term them the vital Spirits of many the great and Royal Rivers of this Kingdom, as of *Thames*, *Trent*, and ſuch like: And therefore I am willing to let ſuch of them as be not outragious and hurtfull, to take up a place of defence within theſe Laws; for the *Trent* at the head is derived from Springs,

as many other Rivers be: and I give both the eſſence and aſſiſtance to them, and ſo in my opinion they are worthy the protection of theſe Laws: and I doubt not but the Waters iſſuing and guſhing from the outragious Springs, may by the provident and diſcreet care of the Commiſſioners be ſo ordered, as the ſame may be applyed and employed to neceſſary uſes.

So now I have run through, like a ſwift Stream, the qualities of theſe Rivers, Gutters, Sewers and Ditches, and of all their dependencies, and wherein they are to have aid and aſſiſtance of theſe Laws of Sewers, being in truth the very Materials of theſe Laws: yet for a little better explanation of their ſeveral natures and kinds, I ſhall therefore put theſe Caſes;

1. Firſt, If the Town of *A.* want Water by the drineſs of the ſeaſon for the uſe of their Cattel, or for other houſehold affairs, as for brewing, waſhing and ſuch like; and in the Town of *B.* which doth adjoin thereto, there is plenty of Waters, more perhaps than is neceſſary for uſe there, the Commiſſioners of Sewers have no power by any of theſe Laws, for any of the ſaid purpoſes, to make any order or decree to relieve the Town of *A.* with Waters from *B.* for this Statute makes but two uſes of Rivers, Sewers and Streams, the one for draining, the other for ſailing; and being for neither of theſe purpoſes, the Commiſſioners have no power to deal therein.

2. But if two Towns do adjoin, and in either of them there is a River Navigable, and by accident one of them is dried up, and the other aboundeth with Waters, more perhaps than there is neceſſary uſe of; I am, in that caſe, of Opinion, that the Commiſſioners of Sewers have power by the Commiſſion to make a Law or Ordinance to relieve the River which wants Waters, out of the abundance of Waters which the other River hath, in help and ſupply of Navigation.

But put the case that *J. S.* keeps Boats for his own necessary uses and occasions, and for no other purpose, the Commissioners have no Warrant by their Commission to relieve *J. S.* with Waters for this his own private use, for that their power is the Republike; Yet if *J. S.* hath used with his Boats to carry and recarry for the common use of the people in general, then he is within the relief of these Laws. 3.

The new Stream and cut which was now of late made and cast by Mr. *Middleton* from *Ware* to *London*, could not have been done by the power of these Laws because it was not made for the draining or sailing, but for household affairs, and therefore special Statutes were enacted to begin, continue and perfect that work in 3, 4 *Jac. Regis*; and after the Stream was effected, these two Statutes brought the same within the power of these Laws. 4.

And now seeing my Law hath brought me in my argument and discourse among the things defended by these Laws; I shall now make a little digression from my Case, to treat of Bridges, and Calceys and Goats, the proper inventions and works of mens hands, and pertinent to this place to be treated of by the order of this Statute; and they be three material Instruments which this Statute by name hath been carefull to take order for.

Bridges.

BRidges are diversly taken in these Statutes, for some are thereby to be maintained, and other some are to be extirped or reformed as Lets and Impediments; wherein I think it not amiss for instruction, to open some other leading Statutes which have provided for them.

The first Statute of *Bridges* is in *Magna Charta*, cap. 15. *nulla villa nec liber homo distringatur facere pontes nisi qui ab antiquo & de jure facere Consueverant tempore Henrici Avi nostr'* *Magna Charta, cap. 15.*

noſtr' this word (*facere*) is to be conſtrued in the ſenſe of *Reparare* or *Manutenere*, for other conſtruction it cannot have. And if this Statute ſhould be in force, I take it that it would abate much the power of the Commiſſioners of Sewers; for it ſeemeth by the Letter of it, that either no Bridges were
H. 2. to be repaired, but ſuch as were made in the time of *H.* 2. and before; neither ſhould any be bound to repair them, but ſuch as in His time had then uſed, and were bound to repair them: but this Statute is neither repealed, nor muſt be abridged, as not to extend to Bridges made ſithence; and I take it, under favour, that it ſtands on ſurrounded grounds, which this Statute hath to do with; as alſo for
22 *H.* 8. 5. ſuch Bridges as the Statute of 22 *H.* 8. *c.* 5. hath power over, which are Bridges ſtanding on High-ways, for both theſe Statutes do in my Opinion oppoſe the ſaid Statute of *Magna Charta*: Howſoever Sir *Edward Cook* in his Caſes of the
Caſe of the of *Ely*. Iſle of *Ely* recites the ſaid Statute as it were in force at this day; and if ſo, then the expoſition muſt be made, as I take it, that all Bridges made and erected ſince are out of the inhibition of that Statute, or elſe that Statute is totally repealed: For otherwiſe all Bridges builded ſince ſhould not be repaired, becauſe no Perſon or Town ſhould be obliged to do them: And then were the power of Commiſſioners of Sewers almoſt altogether inhibited, touching Bridges, and their hands cloſed up for medling therewithall, but I take this Statute of Sewers in full ſtrength to deal with ſuch Bridges as come within the reach of it.

Bridges within the Law of Sewers, are ſuch as lie on or near ſurrounded grounds, eſpecially if they be not onely placed there for free paſſage, but alſo for ſtrength, to defend the violence of the Waters, as many of this kind be; *viz.* *London* Bridge, *Rocheſter* Bridge, the great Bridges at *Lincoln*, *Boſton* Bridge, and the like; and ſuch as lie on Inland and high Countreys, over High-ways, as *Burton*, *Trent*, *Ware*, *Wainsford*, *Huntington* and ſuch like, be within the ſaid Statute of 22 *H.* 8. and I make little doubt of it, but all the ſaid laſt mentioned Bridges are alſo within

in the proviſion of the ſaid Laws of Sewers, for they lie and are built over ſuch Rivers as be all of them within theſe Laws.

The Statute of 22 *H.* 8. extends not to Bridges lying out of High-ways, but the Statute of Sewers doth extend to ſuch alſo: And therefore if a Bridge ſtand on a common Sewer, Ditch or Gutter which hath his current to the Sea, or to ſome River, the Commiſſioners of Sewers have power over ſuch, either to repair the ſame, or to extirp it, as juſt cauſe and occaſion ſhall require. 22 *H.* 8.

It appears by what hath been before ſaid, our Reader was of Opinion that all Ditches (except dry Dikes) Gutters, Sewers, Streams and Water-courſes, where no paſſage of Boats is uſed, nor lying by the Coaſts of the Sea or Marſh-ground, are within the ſurvey and correction of the Commiſſioners of Sewers. And he here ſaith the like of Bridges ſtanding on any Common Sewer, Ditch, or Gutter which hath its current to any River. But yet, under favour this ſeems very queſtionable, upon the words of this Statute of 23 *H.* 8. 5. which ſpeaks onely of Ditches, Gutters, Sewers and Streams by the Coaſts of the Sea, or Marſh-ground; and is expreſly contrary to the Statute of 3 *Jac. cap.* 14. whereby 'tis declared that the Walls, Ditches, Banks, Gutters, Sewers, Gates, Cawſeys, Bridges, Streams and Water-courſes, in and about the City of *London*, where no paſſage of Boats is uſed, having their fall into the River of *Thames*, where it doth uſually ebb and flow, and is uſed for free paſſage of 3 *Jac.* 14.

of Boats to the Sea, though they were as needfull to be surveyed, reformed and amended from noyance of the River of *Thames*, by the Commissioners of Sewers, as those Rivers, Streams and Water-courses, where the Water doth usually ebb and flow, and where more usual passage of Boats hath been, yet are not under the survey, correction and amendment of the Commissioners of Sewers, nor of any Statute of Sewers. And therefore by that Statute of 3 *Jac.* it is provided, that such Walls, Ditches, *&c.* within the limits of two Miles of *London*, shall be subject to the Commission of Sewers, and to all Statutes made for Sewers, and to all penalties in the said Statutes contained, as if the Water therein had ebbed, flowed, and therein free passage with Boats, and Barges to the Sea had been heretofore used.

So that by the Judgment of that Parliament, neither such Ditches, Gutters, Sewers, Streams, *&c.* where there is neither flux or reflux, or passage of Boats, though they fall into a navigable River which ebbs and flows, and is used for free passage of Boats to the Sea, nor any of their Walls or Banks, or the Bridges which stand on them, (other than such as the said Act hath provided for, *viz.* those which are within two Miles of *London*) are within the survey or jurisdiction of the Commissioners of Sewers.

Also

Alſo private Bridges are within theſe Laws, as if *J. S.* and his Anceſtors, owners of ſuch a Houſe, have had and uſed to have a Bridge over a great or leſs River to the Church, and to his Paſture Grounds, or to his Common, this Bridge, and all other of this kind, are within this Statute of Sewers; *viz.* to be put down or reformed if they be Impediments to the Common-wealth, and alſo to be maintained, if thereby the ſame be any material defence againſt the rage and violence of the Waters, otherwiſe not, but for putting down ſuch Bridges which have been by preſcription, I hope the Commiſſioners of Sewers will be well adviſed therein, ſeeing time hath given great approbation of them, and therefore I ſhall handle this point more fully, when I come to treat of Lets and Impediments, where that part of this Statute comes moſt fit to be handled.

The Statute of 22 *H.* 8. extends to the repairing and amending of Bridges onely, but if it be fit to take an Arch away, or to add a new Arch thereto, or to erect and build a new Bridge where none was before, this is moſt fit to be done by the Commiſſioners of Sewers, whoſe power may be extended thereto.

All Bridges ſet upon Rivers by perſons without authority, may be pulled down by the Commiſſioners of Sewers, and the parties puniſhed; for no man ought of his own authority to be ſo bold with the common and High-ways or Streams, as to erect Bridges or other Engines thereon without lawfull Warrant.

Bridges in High-ways, where there is no Stream under, but onely ſome petty Land Stream at rain and wet ſeaſons, theſe be dry Bridges, and be not within this Statute of Sewers, but yet they be within the Statute of 22 *H.* 8. if they ſtand on High-ways: In 14 *Jacobi Regis* it was found by Inquiſition taken at the City of *Lincoln* in the Guild-hall there, before Sir *Thomas Grantham* Knight, and my ſelf, and other Commiſſioners of the Sewers, that the great Bridge at *Bracebridge* near the City of *Lincoln*, and ſtanding upon the River 14 *Jac.*

of *Wytham* thirty Miles from the Sea, was fallen into great decay, whereby Carts, Carriages and Men on Horſe-back could not paſs over the ſame, as in times paſt had been uſed, in defect of *Hen. Sapcots* Eſq. who ought to repair a part thereof, by reaſon of his Manor of *Bracebridge*; and of *Bartholomew Gregge*, who by reaſon of his houſe ſtanding at the Bridge foot, called the *Hermitage*, on the North ſide of the River, ought to repair another part; and of the Corporation of *Lincoln* who was to repair a part thereof; and of the Countrey of *Moreland*, who uſed to repair another part: And the ſame was decreed accordingly. But Mr. *Sapcot* without cauſe finding himſelf grieved thereat, preferred his Bill into the Exchequer Chamber againſt Sir *Thomas Grantham* and others, to be relieved therein; and did alledge, That the ſame ſtood far from the Sea, pretending thereby that the Commiſſioners of Sewers had no power to deal with the ſame: but at the hearing of the Cauſe in *Anno* 16. *Jac.* he was over-ruled in that and all other parts of this Suit.

A Calcey.

A Calcey or Calſway is a paſſage made by art, of Earth, Gravel, Stones and ſuch like, on or over ſome high or Common way leading through ſurrounded grounds for the ſafe paſſage of the King's liege people, and theſe Calceys have always been expreſſed in the ancient Commiſſions of the Sewers in the Regiſter, *Fitz. nat. bre.* and in the Statute of 6 *H.* 6. *cap.* 5. but not any Calceys be in theſe Laws, but ſuch as be over ſurrounded and low grounds, as that of *Barſton Bank*, *Southy Bank*, and ſuch like: but touching Calceys lying in Towns and Villages which be in the high uplandiſh Countries, this Law doth not in any ſort extend unto them, but all Calceys leading over the ſaid Bridges, and near unto them, are provided for by this Law; yet no private Calceys are to be dealt withall by the ſaid Commiſſioners.

Regiſter *F. H. N. B.* 6 *H.* 6.

Goats.

Goats.

GOats be uſual Engines erected and built with Perculleſſes and Doors of Timber, Stone or Brick, invented firſt in *Lower Germany* and after brought into *England*, and uſed here by imitation, and experience hath given ſo great approbation of them, as they are now, and that with good reaſon and cauſe inducing the ſame, accounted the moſt uſefull inſtruments for draining the Waters out of the Land into the Sea: There is a twofold uſe made of them, the one when freſh Water flows and deſcends upon the low grounds where theſe Engines are always placed, and whereto all the Chanels where they ſtand have their currents and drains directed, the ſame is let out by theſe into ſome creek of the Sea; and if at ſome great floods the Seas break into the Lands, the ſalt Waters uſually have their returns through theſe back to the Sea: Many of theſe Goats which are placed on High-ways, ſerve alſo for Bridges. This Goat is no ſuch imaginary Engine as the Mills be which ſome rare wiſe men of late have invented, but this Invention is warranted by experience, the other is rejected as altogether chargeable and illuſory: Yet theſe Engines ſeem to me not to be very ancient here in this Kingdom, for that I do not find them mentioned in any of the ancient Commiſſions granted, before this Statute did expreſs the ſame; and ſurely this Statute was ſo curious in the ſpecial repetition of ſuch defences *in ſpecie* as it intended to defend and maintain, that I am of Opinion, it can ſcarce be drawn to extend to any other: And therefore I do agree with the Opinion of Sir *Edward Cook* in his Caſe of the Iſle of *Ely*, that an artificial Mill, and ſuch like new invented Engines, are not to be erected by the power of theſe Laws, but being once erected and proved by experience to be beneficial to the publique State, they may be continued and maintained by the authority of this Statute.

New Defences.

HItherto I have proceeded onely in the handling and diſcourſing of the old and ancient defences which be helpfull both to Sea and Land: And therefore I am now deſirous to enter into the argument of new defences, being a matter very fit and apt to be diſputed on: And to give ſome warrant to my argument therein, I have ſo compoſed my Caſe, as both old and new be therein contained, wherein the point will be ſhortly this, Whether the new River and new Bank mentioned in my Caſe, could be ordered to be made by the power and authority of theſe Laws: And thoſe which would take a part to argue on the contrary, may alledge much matter, and many reaſons to make good their arguments; firſt, out of the words of the Law it ſelf, for thereby it ſeemeth, that this Statute can bear no ſuch expoſition by reaſon; the words thereof literally taken, ſeem to extend onely to the old and ancient defences, and not to the erecting of new: And the words thereof in this point be theſe;

Foraſmuch as the Walls, Banks, Ditches, &c. by the rage of the Seas, and by the freſh Waters deſcending, be ſo lacerate, dirupt and broken, the Commiſſion therefore doth authorize the Earls of Lincoln, Rutland *and* Exeter; Robert *Lord* Willoughby *of* Grimſthrop, *Sir* William Welby, *Sir* Thomas Grantham, *and Sir* John Hatcher, *Knights, whereof three to be of the* Quorum, *to ſurvey and amend the ſaid Walls, and Banks, Ditches, &c. in all places neceſſary, and the ſame as oft as need ſhall be to make new:* Upon theſe words of the Statute, do thoſe which argue againſt the new defences infer, that the Commiſſioners have not any power to cauſe new Banks, new Walls, or other defences to be erected; and ſo take a difference between the words *nova conſtruere, & de novo conſtruere*, the firſt extending to erect new ones where none were before, and the other purporting the erecting of a new one where before an old one ſtood: and

the

the words which inforce this expoſition, be penned ſtrongly to that purpoſe; for firſt, they have power to repair and amend, What? ſuch Walls and Banks as were before, and the ſame to build new; which words, *The ſame*, literally taken, muſt needs extend to ſuch old fences as were before; and the conſtruction being ſo made, excludes clearly the power to make new ones where none was before: and this expoſition may be exampled in other Caſes of like quality, as in 22 *H.* 6. *fo.* 18. where it is ſaid, *That if Leſſee for years ſuffer a houſe to fall down, and before an Action of Waſte be brought againſt him, he buildeth another in the ſame place where the former ſtood, of the ſame quality and quantity, that ſhall excuſe him in the Action of Waſte:* but ſo would it not have done if he had builded the ſame in all points anſwerable in another place, for the one is renewed, the other a new one: and in the 10 *H.* 7. *fol.* 18. in the Abbot of *Thornton*'s Caſe, the words in a Leaſe were, *That the Leſſee ſhould repair a Chapel leaſed to him, and the ſame de novo conſtruere & conſtructam curare*, which words there bear the ſame ſenſe in expoſition: And the Statute of *Magna Charta cap.* 16. ſeemeth, touching Banks, to ſway the ſame way; for there the Statute is, *Quod nullæ repariæ defendantur niſi illæ quæ fuerunt in defenſo tempore Henrici Regis avi noſtri & per eoſdem locos & eoſdem terminos ſicut eſſe conſueverunt tempore ſuo*; this makes much againſt erecting of new Banks, if it be in force: for if no perſon ſhould be bound to repair ſuch as were built ſince that time, then were it vain to build new ones. Sir *Edward Cook* in his Caſe of the Iſle of *Ely*, is ſtrongly of the ſame Opinion, *That no new River ſhould be made and caſt by the power of this Commiſſion*; for the caſe there is, *That the Commiſſioners of Sewers in thoſe parts made an order and decree, That a new River ſhould be cut out of the old River there called* Owſe, *through the main Land ſeven Miles unto another part of the ſaid River:* And the queſtion there was, Whether the Commiſſioners of Sewers had any ſuch power or not? and he there delivered his Opinion expreſly, That they had not? and affirms it,

22 *H.* 6.

10 *H.* 7. *f.* 18.

Magna Charta cap. 16.

Caſe of the Iſle of *Ely*.

it, *That it was dangerous and inconvenient that Commissioners of Sewers should have any such Power and Authority, for then they might thereby stop up the Havens, which are the Ports of the Realm:* And for the justifying of this Opinion therein, he alledgeth *Fitzher. Na. Bre. fo.* 225. and the *Register, fol.* 252. that in case where a new River or Stream was desired to be made, the Writ of *ad quod damn'* was to be awarded, which should first be directed to the Escheator of that County, to the end he must enquire and certifie what damage it might be if such a Cut should be made, or a new Trench cast; and so concluded directly against the making of new Rivers and Drains by the Commissioners of Sewers. And truly there is one thing more which makes strong on that side, which is, That a new River, Drain or Cut, cannot be made but through some man's private Inheritance, and to the prejudice thereof, which is a matter very considerable: So that all these things laid together, might very well move Sir *Edward Cook* to be of the said Opinion, That no such new River or Drain could be made by the Commissioners of Sewers by the power of these Laws.

Fitz. Na. Bre. fol. 225. *Regist.* 252.

Argumentum in contrarium.

The reasons and authorities put on the other part are weighty and ponderous, and require a very good answer; which I shall endeavour to give thereto: It is true, that the words of this Statute and Commission bear much with the said former exposition; So I hope to find words in this Statute also, which will tend as much the other way: And they be in the fore-part thereof, *viz.* That daily considering the great damages and losses which have happened in many and divers parts of this Realm, as well by the contagious flowing surges and course of the Sea, in and upon marsh grounds, and other low places heretofore through politique wisedom won and made profitable for the Commonwealth of this Realm, *&c.* And these grounds which have been so won, could not be so kept and preserved, but by banking and new fencing in; which proves directly, that the said new Banks and new fencing might be made for the inning and keeping

The Law it self in words extends to it.

keeping of the ſaid new won grounds: And alſo the Statute of 6 *H.* 6. *cap.* 5. gave the Commiſſioners of Sewers power to repair the ancient Banks, and Walls and Fences *& eadem, & alia de novo conſtruere*; by which words the Commiſſioners which had their power from that Statute, might make new defences, as Banks, Walls and ſuch like: And ſo is the opinion of Sir *Edward Cook* delivered upon the ſaid Statute of *H.* 6. in his Caſe of the Iſle of *Ely*, which being obſerved and granted, makes ſtrongly for this part; for that the Statute of 23 *H.* 8. doth not onely confirm all former Statutes of the Sewers then in *eſſe*, but alſo gives authority to the Commiſſioners to do after the Tenor and effect of all and ſingular the Statutes and Ordinances before that time made: And although the ſaid Statute of *H.* 6. was in time then expired, yet the form and effect of it may be followed and obſerved: And to that end I take this diverſity between a Law repealed and a Law expired, for a repealed Law is made void and fruſtrate, as either unworthy or unneceſſary for ſome reſpects to be any longer continued or put in execution, and therefore was forbidden to be uſed or practiſed; but a Law expired in time, though it hath loſt his vigor and force, yet it is like a vertuous man deceaſed, his life and actions may be worthy imitation, though the date of days be at an end; but a Law repealed is like a man condemned for ſome Offence, whoſe Life and Actions are neither of them worthy Imitation, unleſs it be to doe the contrary: And the ſaid Statute of *Henry* 6. was a worthy Law, which this Statute intended not to come ſhort on, but to extend farther than the Limits of that Law did reach unto: alſo the ſaid Statute of *Henry* 6. is uſed by Sir *Edward Cook* in the pleading of *Rook*'s Caſe in his 5th Report, where he could make there no other uſe of it, ſeeing it was in time expired, than onely by way of imitation.

The expired Law of *H.* 6. giveth aid to this expoſition.

Rook's Caſe.

Alſo we muſt conceive, that theſe Laws of Sewers are of great and urgent neceſſity and uſe for the good of the whole

The equity of this Law will help this expoſition.

whole Commonwealth of the Realm, and therefore the intent thereof may be extended in expoſition beyond the letter of the words; for the words be (*and the ſame to make new*) which according to the bare words in a literal conſtruction, cannot extend to new ones where none was before, but to the reedifying of the decaied old ones; but the learned Expoſitor, whoſe conſtructions be not ſo much grounded upon the letter as upon the ſenſe, may in equal juſtice extend the ſenſe to new making, as well as to renewing of defences; for Mr. *Bract. li.* 1. *Chap.* 3. defineth equity to be *Rerum convenientia quæ in paribus cauſis paria deſiderat jura & omnia bene coequiperat & dicitur equitas quaſi equalitas:* And if the grave and learned Judges have in private affairs introduced this equity to direct, inlarge or diminiſh the letter of the Laws in the ſenſe of conſtruction, as by many Preſidents we find in Mr. *Plow. Com.* in *Hill* and *Grange's* Caſe, *fol.* 178. and in many other authorities, *à fortiori* ſhall this Statute of 23 *H.* 8. be expounded with as much favourable equity as can be, to inlarge the letter of the Law in the ſenſe of conſtruction, becauſe it tends ſo much to the advancement of the Commonwealth, *Et qui heret in litera heret in cortice.* And if the makers of the Law, when this Statute was put into the frame, had been demanded, whether their meaning was to have it extended to the making of theſe new defences where either juſt occaſion or neceſſity did inforce it; they would have anſwered, That they ſo intended it; for the ſoul and life of the Law lieth in the ſenſible expoſition thereof, and not in the bare letter, as Mr. *Plow.* alſo fully demonſtrates in his *Com.* in *Eaſton* and *Stud's* Caſe.

Bracton.

Hill and *Grange's* Caſe.

And whereas it is formerly alledged, that the warineſs of the Common-law was ſuch in theſe Caſes, that it admitted not one ſuch new Trench, River or new Cut to be made, without the awarding out of the Writ of *Ad quod damn'* directed to the Eſcheator, an Officer ſworn to enquire, firſt, what damage it might be if ſuch a new cut or drain were made? and then upon his inquiſition returned, there might

might be one made, if by the inquiſition it were found convenient, elſe not to be proceeded farther in: But in anſwer thereto, being the argument ſet down in the ſaid Caſe of the Iſle of *Ely*, I am of Opinion, That there may be more wary and circumſpect proceedings by this Commiſſion, than in the *Ad quod damn'* by the Eſcheator; for there be many Commiſſioners which be all ſworn, and in the *Ad quod damn'* there is but one, the Eſcheator, *plus vident oculi quam oculus & tutius eſt rem committere pluribus, quam uni*, and in my opinion, it is much better to commit this weighty buſineſs to many Commiſſioners of great gravity, experience, learning, wiſedom and integrity, than to one Eſcheator, who may perhaps want all thoſe vertues: And farther, whereas in the ſaid Caſe of the Iſle of *Ely*, it is inferred, or rather feared, that by giving this power to the Commiſſioners of Sewers, they may thereby ſtop up the Havens of this Kingdom; that fear is needleſs, for I find, that neither by the letter nor the ſenſe of theſe Laws, any ſuch expoſition can be made, either to the ſtopping up or hindring of their currents and paſſages. But to proceed in my former diſcourſe in making new defences: I know that in the 43, and 44 *Eliz.* a great controverſie did ariſe in the County of *Lincoln*, about the building and erecting of two new Goats at *Skirbeck* and *Langrate*, for the draining of the Waters out of South *Holland* Fens into *Boſton* Haven; which work Sir *Edward Dimock* Knight, did further what he might, by the ſtrength of himſelf and his friends; and it was oppoſed by the Countrey of *Keſteven*: and the very exception thereto taken, was, That the Commiſſioners of Sewers could not by the power of their Commiſſion make a Law for the erecting of theſe new Goats where never any ſtood there before: And that Caſe proceeded ſo far, as the ſame came in the end before the two Chief Juſtices, *Popham* and *Anderſon*, who both delivered their opinions, that the ſaid new Goats, if they were found to be profitable for the good and ſafety of the County, might be erected by the power of this Statute; but they then wiſhed and adviſed, that the

43 & 44 *El.*

Commiſſioners ſhould be wary, provident and circumſpect to adviſe deliberately before hand, that by the opinion of experienced perſons in thoſe affairs, the ſaid new works ſhould in all appearance ſeem to be profitable to the Commonweal, if they were effected; and that Commiſſioners ſhould not in any ſort make ſuch devices at the ſuit, proſecution, and requeſt of private perſons for their private and peculiar good, who many times ſought their own ends under pretence of the publick good. And a like great controverſie did ariſe in 12 *Jac.* in the Counties of *Cambridge*, *Huntington* and *Northampton*, about the making of new cuts and drains in the Iſle of *Ely* by the power of the Commiſſioners of Sewers, which being much oppoſed, the ſame came in the end to be heard before the King and Council, wherein this Order was conceived as followeth.

The King's Councils Order.

HIS Majeſty's Attorny-general having according to an Order of this Board of the Thirteenth of *October* laſt, called unto him the King's learned Council; and taking information of ſuch Complaints as were firſt exhibited unto this Board, touching ſundry Suits and Vexations moved of late by certain obſtinate and ill-diſpoſed Perſons, againſt His Majeſty's Commiſſioners of Sewers, for the Counties of *Lincoln*, *Huntington*, *Northampton* and *Cambridge*, and their Officers and Miniſters, for executing the Orders and Decrees of the Commiſſioners, to the manifeſt deſtruction and inundations of many large levels and parts of the ſaid Counties: And having by their Lordſhips like Directions,

upon

upon adviſed conſideration, weighed and compared the ſaid late and undue proceeding with ancient Laws of this Realm, appearing in divers notable Records in the point now queſtioned, with the continual and concurrent practice of ancient and later Times; and alſo the Opinions of the Lord *Popham*, late Chief Juſtice, delivered in writing very exactly and fully upon the ſaid Queſtions, touching the Power and Authority of the ſaid Commiſſion; and thereupon making report at large unto their Lordſhips this day in full Counſel, of the whole ſtate of the Cauſe; Foraſmuch as thereby it appeared, That theſe Inventions and Diſturbances conſiſt upon four Heads, wherein the extent of the Commiſſion was queſtioned, upon pretext and conceit of Law: Firſt, That the Commiſſioners of Sewers had not authority to cauſe new Banks, Drains or Sluces to be made where there had not been any before. Secondly, That they might not lay the Tax or Rate upon Hundreds, Towns or Inhabitants thereof in general, but upon the firſt preſentment or judgment to charge every man in particular, according to the quantity of his Land or Common. Thirdly, That they had not power ſufficient to commit to priſon Perſons refractory and diſobedient to their Orders, Warrants and Decrees. And laſtly, That Actions of Treſpaſs, Falſe impriſon-

ment, and other Proceſs at the Common-law, have been brought againſt ſome of their Officers and Miniſters for executing their Decrees and Warrants; Their Lordſhips finding in their wiſedoms, that it can neither ſtand with Law, nor with common Senſe or Reaſon, that in a Cauſe of ſo great conſequent the Law can be ſo void of providence, as to reſtrain the Commiſſioners of Sewers from making new Works to reſtrain the fury of the Waters, as well as to repair the old where neceſſity doth require it for the ſafety of the Countrey, or to cauſe a charge upon the Towns or Hundreds in general that are intereſſed in the benefit or loſs, without attending particular ſurvey or admeaſurement of Acres, when the ſervice is to have ſpeedy and ſudden execution, or that a Commiſſion of ſo high a nature, and of ſo great uſe to the Commonwealth, and evident neceſſity, and of ſo ancient juriſdiction, both before the Statute and ſince, ſhould want means of coertion for obedience to their Orders, Warrants and Decrees, when as on the performance of them, the preſervation of many thouſands of His Majeſty's Subjects Lives, Goods and Lands doth depend; It plainly appearing, That it will be a direct fruſtrating and overthrow of the Authority of the ſaid Commiſſion of Sewers, if the Commiſſioners, their Officers and Miniſters ſhould be ſub-

ject

ject to every Suit at the pleaſure of the Delinquent in His Majeſty's Courts of the Common-law, and ſo to weary and diſcourage all men from doing their duties in that behalf: For the Reaſon aforeſaid, and for the ſupreme Reaſon above all reaſons, which is the ſalvation of the King's Land and People, Their Lordſhips did order, That the Perſons formerly committed by this Board for their contempt concerning this cauſe, ſhall ſtand committed untill they releaſe or ſufficiently diſcharge ſuch Actions, Suits and Demands as they have brought at the Common-law againſt the Commiſſioners of Sewers, or any the Miniſters or Officers of the ſaid Commiſſion; ſaving unto them nevertheleſs any Complaint or Suit for any Oppreſſion or Grievance before the Court of Sewers, or this Table, if they receive not Juſtice at the Commiſſioners hands. And their Lordſhips farther Order, That Letters from the Table ſhall be written to the Commiſſioners of Decrees of like nature, when it ſhould be found needfull, requiring, incouraging and warranting them to proceed in the execution of their ſeveral Commiſſions, according unto former practice and uſage, Any late diſturbance, oppoſition or conceit of Law whereupon the ſaid diſturbance hath been grounded notwithſtanding; with admonition nevertheleſs, That care be taken that there

be

be no juſt cauſe of complaint given by any abuſe of the ſaid Commiſſion.

Examinat' per Edmunds Cleric' Conſilii.

Preſent at this Order making, were,

1. The King's Majeſty in Perſon.
2. The Archbiſhop of *Canterbury.*
3. L. Chancelour *Elſmeare.*
4. L. Treaſurer Earl of *Suffolk.*
5. L. *Steward* D. *de Lenox.*
6. L. Admiral *Howard* Earl of *Notingham.*
7. L. Chamberlain Earl of *Pembroke.*
8. E. of *Arundel*, *Howard.*
9. Viſcount *Wallingford.*
10. Viſcount *Fenton.*
11. *Andrews* Biſhop of *Ely.*
12. Lord *Wotton.*
13. Lord *Cary.*
14. Secretary *Winwood.*
15. Secretary *Lake.*
16. Sir *Foulk Grevil* Chancelour of the Exchequer.
17. Maſter of the Rolls *Ceſar.*
18. Sir *Francis Bacon* Attorney-general.

All of them of the Privy-Concil.

This order is in ſome points legal, and may ſtand for a direction in matters of Law, and the other parts thereof may ſtand for a preſident of ſtate; and it thereby plainly appeareth, that the King's learned Council were of opinion, That the ſaid new works might be ordered and decreed to be done by the Commiſſioners of Sewers, and that the ſame had warrant from former preſidents.

But

But the laſt allegation on the contrary party is very forcible againſt this argument, That by the making and erecting of theſe new Defences, the inheritances of private perſons are thereby prejudiced whereon they be built; yet as *Cato* ſaith, *Vix ulla Lex fieri poteſt quæ omnibus utilis ſit ſed ſi majori parti proficiat ſufficit*; and therefore this objection I thus Anſwer, That theſe new works are not to be undertaken but upon urgent neceſſity in defence of the Countrey, or for the ſafety thereof, ſo that the Commonwealth be therein deeply intereſſed and ingaged; and things which concern the Commonweal are of greater accompt in the Law, than the intereſt of private perſons. *Cato.*

And ſo it is 13 *H.* 8. *fol.* 16. That the Commonwealth ſhall be preferred before the private Eſtate, and for the good of the Commonwealth a private perſon ſhall receive damage, if otherwiſe it cannot be eſchewed; as a private man's houſe ſhall be pulled down, if the next houſe thereto be on fire, to ſave the Town; and the Suburbs of a City may be pulled down in time of War, to ſave the City; and Bulwarks may be raiſed on private mens grounds for defence of the Realm: And what greater Enemy can there be than the Sea, who threatens with his mercileſs waves to ſwallow up all before it, but that the hand of the Almighty hath tied and bound him in the fetters of his eternal decree, and given policy and means to man to keep him from invading the Land by artificial works, proper for ſuch ſervices? Therefore in my Opinion, by the very true intent and meaning of the ſaid Statute, and by a juſt, equal and reaſonable conſtruction, it ſhould lie in the power of the Commiſſioners of Sewers, upon juſt and urgent occaſions and conſiderations, to make Orders and Decrees for erecting and making of new Banks, new Walls, Goats, Streams, Sluces, and other neceſſary Defences againſt the overflowing of the Sea; For *Ubi nova fit maris incurſio ibi novum eſt apponendum remedium*, with this caution, That under the pretence of the Commonweal a private man's welfare be not intended to the charge, trouble and burthen of the Countrey: And with this 13 *H.* 8. *Pro ch.* 8. *ver.* 27.

this alſo, That where any man's particular intereſt and inheritance is prejudiced for the Commonwealths cauſe, by any ſuch new erected works, That that part of the Countrey be ordered to recompence the ſame which have good thereby, according as is wiſely and diſcreetly ordered by two ſeveral
27 *El. c.* 22. Statutes, the one made in *Anno* 27 *Eliz. Chap.* 22. *Raſtal* Havens and Rivers, is where the Commiſſioners have power to compound and agree with the Lords and owners of the grounds through which the new Cuts are to be made;
3 *Jac.* 14. And the other 3 *Jac. Reg. c.* 14. for bringing the new ſtream to *London:* and although theſe Statutes hold not in the general caſe of Sewers, but are applied to the ſaid particular matters therein expreſſed, yet they may ſerve as good Rules to direct our Commiſſioners to imitate upon like occaſion happening.

In the Caſe of the Inhabitants of *Outwell*, *Newton* and *Tyd*, *Hil.* 1649. in *Sup. Banc.* it was urged by *Twiſden* of Council, with the ſaid Vills, that the Commiſſioners of Sewers cannot order a new Wall to be made, notwithſtanding what *Calis* here ſaith; and *Roll* ſeemed to incline to that opinion; but yet allowed the Commiſſioners Order, becauſe it appeared that the Wall which they had ordered to be made was not wholly a new work; and ſo not within the Caſe of the Iſle of *Ely*, which was for the making of a new work totally: *Style* 192.

But it was clearly reſolved, *Paſch.* 18 *Car.* 1. *B. R.* That if an old Wall or Bank be thrown down by the violence of a Tempeſt, and that was ſtraight, the Commiſſioners of Sewers may order a new one to be made there, in the form of

of a Horſeſhoe, or any other form: *March* 198, 199, 200.

The ſecond Point upon this Statute.

It appeareth by my Caſe, That the Commiſſioners of Sewers did decree a new Bank to be raiſed, and a new River to be caſt, and an old Sewer to be repaired upon their view, ſurvey and diſcretion. The Words of this Commiſſion upon which I framed this part of the Caſe be theſe (*videlicet*) *We have aſſigned you* Theophilus *Earl of* Lincoln, Robert *Lord* Willoughby *of* Earsby, *Sir* George Manners *Knight*, *Sir* Philip Tyrwhit, *and Sir* John Wray, *Knights and Baronets*, *Sir* William Pelham, *Sir* John Read, *Sir* Edward Aſcough, *Sir* Hammond *Knights*, Anthony Erby, *Eſq*. Quor'; *the ſaid Earl, Lord, and Sir* George Manners, *we will to be three to ſurvey the Walls, Banks, Drains, Sewers*, &c. *and the ſame to cauſe to be repaired, amended or put down as cauſe ſhall require, after your wiſedom and diſcretions, and to doe after our Statutes; as alſo to inquire by the oaths of lawfull and honeſt men of thoſe places where ſuch default be.* By the Tenor of which words I conceive, That Commiſſioners of Sewers have power by their Commiſſion to proceed three manner of ways; (*viz.*) firſt, By Survey: 2. By Jury: 3. By diſcretion; wherein it behoveth Commiſſioners of Sewers to know perfectly how to uſe and diſpoſe of their powers with due underſtanding of theſe parts of this Commiſſion and Law: And the better to prepare them herein, I ſhall take ſome pains to declare unto them what they may do by ſurvey without a Jury, and what by Jury, and what by their diſcretion, without both ſurvey and Jury.

View and Survey.

VIEW is the primary part of Survey, and Survey is much, but not altogether directed by view. It is true that View is of great uſe in the Commonlaw, and it is to

be done and performed in perſon, and ſuch Views are taken in Trials of Aſſizes; yet by the 36 *H.*8. in *Dyer f.* 61. a very perſonal View needeth not in an Aſſize, if upon examination of the Jurors it may appear, that a competent number of them know the grounds in queſtion, in ſuch ſort as they can put the party in poſſeſſion if he recover; but in an Action of Waſte, an expreſs perſonal View is both required and requiſite, for the words of that Writ directs the Sheriff *Accedere ad locum vaſtatum*; In a word, there is a diverſity between a View and a Survey, for by the View one is to take notice onely by the eye, but to ſurvey is not onely to take notice of a thing by the eye, but alſo by uſing other ceremonies and circumſtances, as the hand to meaſure, and the foot to pace the diſtances.

Penington's Caſe.

And the Commiſſioners Surveyors have power to take information by examination of others: And although Judge *Fitz.* in 27 *H.* 8. *fol.* 28. holds a Surveyor of very ſmall eſteem in his power and authority, that is, That he may hear, ſee and ſay nothing, *Oier voier & rien dire:* Yet under the favour of that Book, I take a Surveyor to be of more eſteem and authority; for by an old Statute made in 4 *Ed.* 1. *Raſtal* Surveyors, firſt, he is there deſcribed to be a man which is to view the work, and to make inquiry, and to ſet down which be Copiholds, which be Freeholds, *&c.* whereby it appeareth, that a Surveyor is an actor, and not a looker on, as Mr. *Fitzherbert* would have him; ſo by theſe deſcriptions the Commiſſioners may inform themſelves what is meant by the word *Survey*, put in the Statute: And many of our Statutes take notice of ſuch an Officer as a Surveyor; For in the Statute of Bridges and High-ways, there be ſuch Officers appointed; and in the Statute made for the erection of the Court of Wards and Liveries, there is a grave Officer appointed, who is called the Surveyor general of that Court, and he is a Judge in matters there handled.

27 *H.* 8. 28.

4 *Ed.* 1.

And there is alſo an Officer in this Statute of Sewers, called a Surveyor, who hath no judicial power, but is meerly an Officer.

What

What things Officers of Sewers may doe by Survey onely.

EVery thing which Commiſſioners of Sewers are to do, muſt be by the true underſtanding of their authorities; and this muſt be ſo done, that they make ſuch diſtinctions, differences and applications as may ſtand with knowledge, skill and learning; or otherwiſe their proceedings will prove irregular: And therefore it is not onely meet to deſcribe the Officer Surveyor as formerly I have done, but alſo his Office, which I now mean to do.

Firſt, Commiſſioners of Sewers may view the Defences, and thereby may inform themſelves which ſtands in need of repairing and amending, and which not; and wherein the defaults and defects appear to be, and what they be. 1.

Secondly, they may by Survey take notice and knowledge, by conference with Carpenters, Maſons, Smiths and other Officers, what things are fitting to be provided for effecting the works, and what ſums of money will be ſpent for the finiſhing thereof. 2.

Thirdly, the Commiſſioners may by view and ſurvey, take knowledge of the lets, impediments and annoiances in the Banks, Walls, Rivers, Streams, Gutters, Sewers, and of the height and lowneſs of the ſaid Banks and Walls; and may thereby diſcover and find out the wants, imperfections, weakneſs and ſtrength of them, and ſo may cauſe the lets and impediments to be removed, and the wants to be ſupplied, and the weak places ſtrengthned, as cauſe ſhall require. 3.

Fourthly, alſo by Survey onely they may ſufficiently inform themſelves of the incroachment, and of the ſtraitneſs, depth, wideneſs and ſhallowneſs of the Rivers, Streams, Gutters and Sewers, and may view the defects in theſe kinds. 4.

Theſe things I have produced, as proper to be performed by view and ſurvey of the Commiſſioners.

And by *Herne*'s opinion in his Reading, *p.* 3. a Man that is blind cannot be a Commiſſioner of Sewers, becauſe he cannot view or ſurvey.

And now I ſhall proceed to the reſt.

Things to be done by a Jury.

1. FIrſt, what perſon or perſons did erect and ſet up any let and impediments, as a Floud-gate, Mill-dam or ſuch like, muſt be found by Jury; for here the words of the Statute are to be obſerved, which are theſe, *And alſo to inquire by the oaths of good and lawfull men of the ſaid ſhire or ſhires, place or places, where ſuch defaults or annoyances be, as well within liberties as without, by whom the truth may rather be known through whoſe default the ſaid hurts and damages have happened, or who hath, or holdeth any Lands or Tenements, or Common of paſture, or profit of fiſhing, or hath or may have any hurt, loſs or diſadvantage by any manner of means in the ſaid places, as well near to the ſaid Dangers, Lets and Impediments, as inhabiting or dwelling thereabouts, by the ſaid Walls, Ditches, &c.* So that the firſt Article is full within the words of this Statute; and therefore it muſt be done by Jury, and no other accuſation is of ſufficient ſtrength in the Law to put a man to his anſwer. And herein the makers of theſe Laws did ſagely, for how ſhould Commiſſioners of Sewers take notice by view or ſurvey of ſuch things as are done or committed in their abſence?

2. Secondly, if any Wall, Bank, River, Sewer, or other defence be defective by neglect or ſufferance of ſuch as ſhould repair the ſame, the Commiſſioners of Sewers are to inquire by Jury in whoſe default the ſame happened.

3. Thirdly, the Commiſſioners are to enquire, What perſon or perſons ought or be bound by Cuſtome, Preſcription, Tenure, Covenant or otherwiſe; or for or by reaſon of what Lands or Grounds he or they be tyed or bound to do the repairs, and where thoſe Grounds do lie, and who be the owners thereof?

And

And if a Jury find before the Commiſſioners of Sewers, that one ought to repair a Bank, *&c.* which is decayed by the Sea, *&c.* and it be removed into the *King's Bench.* The Juſtices there will not quaſh the Inquiſition, or grant a new Trial, unleſs the Perſon who was found guilty will firſt repair the Bank, of which he ſhall be reimburſed, if he be acquitted; And becauſe the Lord *Dunbarr* refuſed ſo to doe, the Court of *King's Bench* granted a *Procedendo*, *Siderfin* 1. 78. And this ſtands with great reaſon, becauſe of the damage which may happen, if the repair ſhould be deferred, untill it were determined who ought to doe it.

Fourthly, alſo it muſt be inquired by Jury, What Grounds lie within the hurt or danger of Waters, either within the ſurrounder by the Sea, or the inundation of the freſh Waters, and to whom they do belong? 4.

Fifthly, and if a new Sluce, Goat or other defence is to be erected, built and made, or a new Sewer, Gutter or Trench to be caſt, this may be determined of by the view and ſurvey of the Commiſſioners, and ſo may the aptneſs of the places where they are to be ſet or caſt, and the length, height, bredth and depth of them; for theſe things are proper for a view and ſurvey: But what perſons hold Lands and Tenements within the Level, which are fit to be chargeable thereunto, and the quantity of their Lands are to be inquired of by Jury. And theſe few cauſes I have put for example ſake: and if any other fall out within the like reaſon, then they are to receive the ſame conſtruction. 5.

Sixthly, in every caſe where an Amerciament is to be impoſed, it muſt be by preſentment of good and lawfull men upon 6.

upon their Oaths, *Et hoc per ſtatutum de Magna Charta*, c.14. *nulla miſerecord' ponatur niſi per Sacramentum proborum & legalium hominum de viceneto, &c.*

Upon a preſentment made by a Jury to the Commiſſioners of Sewers, an Order was made by them to reimburſe the Dyke Reeves for money expended in repairing a Sea-wall, by laying a Tax upon divers Towns; which preſentment, order, and the proceedings thereupon being removed by *Certiorari*, *Mich.* 1649. Exception was taken thereunto for that 1. It did not appear that the Breach was within the Hundreds whence the Jury came, and ſo they had no authority to enquire. 2. The Jury had onely power to enquire of things within the Hundred of *Wiſbitch*, and it did not appear that *Newton* and *Tyd*, two of the Vills taxed, were within that Hundred; and ſo the Commiſſioners had exceeded their authority; and the preſentment was quaſhed: *Style* 185, 191, 192.

The preſentments at a Court of Sewers muſt be by the oaths of twelve men; and therefore is upon a *Certiorari* directed to the Commiſſioners of Sewers, they return a preſentment to be *per ſacramentum Juratorum* generally, without ſaying, twelve men, it is not good, becauſe that for any thing appears to the contrary, it might be by two or three onely, where it ought to be by twelve, *March* 198.

Surveyors

Surveyors preſentment.

BUT it hath been uſed, that Surveyors of the Sewers have made preſentments of defaults of things governed by theſe Laws; but whether ſuch a preſentment be binding or not, is a good point. It is clear in my Opinion, that they can make no preſentment, but ſuch as happeneth within their view and ſurvey, and what thoſe things be they formerly appeared. They cannot preſent that *J. S.* is bound by preſcription, cuſtome, covenant or otherwiſe, to repair ſuch a Wall, Bank or Sewer, for this is not within their Office. In *Kelloways Rep. f.* 141. there is a cuſtome alledged, that two men within the provoſt might preſent the Articles of the Leet; But I doubt of ſuch Preſentment, though it have a cuſtome to ſtrengthen it: I take this difference, that an original preſentment Surveyors cannot make, as to preſent *J. S.* that by the tenure of his Lands he ought to repair ſuch a Bridge, Wall, Bank or other Defence; But the Surveyors may make a ſupplemental preſentment; as for example, if it hath been preſented before by a Jury, that *J. S.* ought to have repaired ſuch a Ditch, and hath not done the ſame, and day is given him by the Commiſſioners of Sewers to doe the ſame, if the ſame be not repaired at the day, the Surveyor may preſent in this caſe the not repairing, becauſe this is but an Oath of aſſiſtence, *ad informandum conſcientiam Judicis*, for the amerciament ſhall be impoſed by the force of the ſaid former preſentment; and this latter preſentment by the Surveyors, is onely to give the Juſtices notice of the Parties farther neglect, to the end they may impoſe the greater amerciament: And a preſentment by Surveyors is not traverſable, being of ſo ſmall eſteem in Law, as our Law will not vouchſafe to take an iſſue upon it, for their act herein is not in the ordinary legal form.

Kelloway's Rep. f. 141.

What

What Commissioners of Sewers may doe by discretion.

DIscretion is the herb of grace that I could wish every Commissioner of Sewers well stored withall, for the makers of this Statute had an intention to make it of great use, being literally nominated nine or ten times in this Law, and for this cause I have inserted in my Case; but note, that the word *Wisedom* is coupled with it, and the word *(Good)* is annexed to them both, as best shewing of what pure Metal they should be made of, *After your good Wisedom and Discretion.*

There be three several degrees of Discretion, *Discretio generalis*, *Discretio legalis*, *Discretio specialis.*

1. *Discretio generalis* is required of every one in every thing that he is to doe or attempt.

2. *Legalis discretio* is that which Sir *Edward Cook* meaneth and setteth forth in *Rooks* and *Keighly*'s Cases, *Hoc est scire per legem quod sit justum*; and this is meerly to administer Justice according to the prescribed rules of the Law; and herein is this discretion limited, that it go not beyond or besides those Laws which are to be executed: And this discretion is to be governed by the Laws, for *Cicero* saith, *Sapientis est judicis cogitare tantum sibi esse permissum quantum sit Commissum aut creditum.*

Cicero.

And according to this discretion the Commissioners of Sewers ought to proceed, as was resolved in the Case of *Hetley versus* Sir *John Boyer*, *Bulstr.* 2. 197, 198. *Cro. Hil.* 11 *Jac.* 336.

3. The third Discretion is where the Laws have given no certain rule to be directed by in a Case within the power of this Commission, there the Commissioners are to order these affairs with such Wisedom and judgment, that although their censure be not framed in a Rule of Law, yet they

they are to do therein *ſecundum æquum & bonum*; and herein diſcretion is the abſolute Judge of the Cauſe, and gives the Rule: But in the caſe of Legal Diſcretion, there diſcretion is but a ſervant, and is tied to attend upon the Law; and there the Law directs the cenſure, and Diſcretion is but to doe the ſame wiſely and temporately; for *ipſæ etenim leges cupiunt ut jure regantur.* Sir *Ed. Cook* in *Rook's* Caſe 5 *Report*, gives this Rule to the Commiſſioners, *That although the words of the Commiſſion be, That they ſhould do according to their Diſcretions, yet their proceedings ought to be limited and bounded within the Rules of Law and Reaſon; for that Diſcretion is a Science to diſcern betwixt falſity and truth, between right and wrong, between ſhadows and ſubſtance, betwixt equity and colourable gloſſes, and the Commiſſioners ought not to follow their wills and private affections*; for that *talis deſcretio diſcretionem confundit*: And therefore now I will declare in few words, in what things theſe Commiſſioners are to be ruled by good Diſcretion. *Cato.* *Rook's Caſe.*

1. Firſt, the quantity of Fines be left to the diſcretion of the Commiſſioners.

2. *Item*, Impriſonment of the Bodies of the Offenders when they deſerve, and the time how long, lieth much in their diſcretion.

3. *Item*, It lieth in their grave Wiſedoms and Diſcretions, when and where to erect new Walls, Banks and other Defences, and what ſums of Money to raiſe and levy therefore.

4. The election of Officers lieth in their diſcretion.

5. It lieth many times in their diſcretion whom to fine, and whom to impriſon.

6. I take it this word *Diſcretion* uſed in the Statute, giveth power to the Commiſſioners to order buſineſſes there ariſing in courſe of equity, for *hoc nihil aliud eſt*, but to proceed *ſecundum æquum & bonum.*

I have put theſe few Caſes as examples to direct and inſtruct what may be done by Diſcretion, omitting many other, becauſe I had rather truſt to the worſt certain Law,

than to give too much way to the uncertain diſcretion of
Ariſtotle Ret. the Commiſſioners, according to the old ſaying, *Quoad fieri poſſit quàm plurima legibus ipſis definiantur quam pauciſſima vero judicis arbitrio relinquantur*; and herein I ſuppoſe I have made good my words in this, that I have proved by my Argument, That the ſaid new Bank and new River might well be decreed by the view and ſurvey of the Commiſſioners, and by their good diſcretion, and ſo might the ſaid old Sewer be repaired; and therefore theſe being ended I will now proceed to the handling of the reſt remaining.

My former labour hath been to expound and declare what defences, as well againſt the overflowing of the Sea, as againſt the inundation of freſh Waters, were and be to be maintained, and alſo new erected by the Tenor and power of theſe Laws: So that now it comes very aptly to be handled, for what cauſes, conſiderations and matters one ſhall or may be tied to the repairing and keeping thereof; which I take to be theſe nine ſeveral ways.

1. By Frontage. 2. By Ownerſhip. 3. By Preſcription. 4. By Cuſtome. 5. By Tenure. 6. By Covenant. 7. *Per uſum rei.* 8. A Townſhip. 9. By theſe Laws of Sewers.

I ſuppoſe I ſhall produce ſufficient Warrant and Authorities for to maintain all theſe diſtinctions, wherein I am deſirous that Commiſſioners of Sewers, for whoſe learning and inſtruction I have taken theſe pains, would apply themſelves to doe their duties and ſervice herein carefully and adviſedly and like to skilfull Phyſicians, would apply fitting Medicines to the curing of every Diſeaſe, elſe ſhall they oftentimes *Opprimere inſontes & dimittere reos:* But if they will ſeriously caſt their eyes upon theſe inſuing Caſes, they will be very helpfull to them in their proceedings.

Frontage.

Frontage.

FRontage is where the Grounds of any Man do join with the brow or front thereof to the Sea, or to great or royal Streams; and in caſe of the Sea or royal River, the property of the Banks and Grounds adjoining are and belong to the Subject, whoſe Lands do but and bound thereon, but the ſoil of the Sea and royal Rivers do appertain to the King, as formerly in my Tractate of Rivers may appear. But in caſe of petty and mean Rivers and Streams, the ſoil of them, as well as the Banks thereof, do appertain to them whoſe Grounds adjoin thereto; ſo that Frontage and Ownerſhip in baſe inferior Rivers do not differ, but in great Streams and the Sea they do vary as aforeſaid: And in *37 lib. Aſſiz. plac.* 10. it ſeems that the Frontagers are bound to the repairs; and in 8 *H.* 7. he whoſe Grounds are next adjoining to a High-way, is bound to repair the ſame. And by theſe caſes there is no difference touching repairs of the High-ſtreams and the High-ways in my opinion.

37 Aſſiz. pl. 10. *8 H.* 7.

Ownerſhip.

THE Ownerſhip of a Bank, Wall or other Defence is a ſufficient warrant to impoſe the charge of the repairs thereof upon him, without being tied thereto by preſcription, as appears in 8 *H.* 7. *fol.* 5. and it ſtands with reaſon, that every man ſhould be bound to repair his own; and the conſideration is alſo moving, for that his Grounds which lie neareſt the Waters are ſooneſt ſubject to drowning, and if any increaſe be upon the ſmall Rivers it falls to his ſhare.

8 H. 7.

Preſcription and Cuſtome.

PReſcription and Cuſtome are much of one quality, for in both of them the efficient matter is (uſe to repair) and the Law hath taken notice of them in many of our Books: Preſcription doth not bind or tie one to the repair of any thing, unleſs it be *ratione terræ.*

And neither in that caſe, barely in reſpect of the Land, but of the Eſtate which the Party hath in the Land; And therefore it hath been adjudged, that a preſcription that every Occupier, *&c.* uſed to repair a Defence is naught, for 'tis too general, and would extend to Tenants at will, ſufferance, diſſeiſors, *&c.* but it ought be, He and all thoſe whoſe Eſtate, *&c.* *Cro. Jac.* 445. *Audly verſus Fawkener.*

And in this it doth differ from Cuſtome: for if it be preſented that *A. B.* and his Anceſtors have time out of memory uſed to repair ſuch a Bank, Wall or other Defence, this preſentment is void, and doth not bind the party *prout conſtat* in 21 *E.* 4. 38. 7 *H.* 4. 31. 19 *H.* 7. *Kelwey, fol.* 52. and 45 *E.* 3. But Bodies politique or corporate may be by Cuſtome bound to repairs, without making mention in the Preſentment or Indictment that they are to do the ſame *ratione talis Meſſuagii terræ aut tenementi*; And to that purpoſe be the Books of 21 *E.* 4. 38 *and* 44 *Ed.* 3. *Fitzherb.* Title *Bar. plac.* 103. for there a Prior was preſented, that he and his Predeceſſors had uſed time out of memory to repair ſuch a Bridge, which was in decay, and this preſentment, though it charged no Land, was good: And in 19 *Hen.* 7. aforeſaid, it is ſaid, that one might be bound to repair a Bank or Wall *ratione Reſiantiæ*, but this could not be otherwiſe taken but that he was charged to doe the ſame

21 *Ed.* 4.
7 *H.* 4.
19 *H.* 7.
45 *Ed.* 3.

21 *E.* 4.
44 *E.* 3.

19 *H.* 7.

ſame for the Houſe he dwelt in, for *Reſiantia* imports ſo much.

Alſo if a man and his Anceſtors have voluntarily made a defence for a long ſeaſon, this will not bind his Heir thereto, though he have aſſets deſcended to him in Fee ſimple, for deſcending charges will not bind the Heirs, unleſs he deſcending have aſſets, as an equal conſideration to bind him thereto; neither will deſcending aſſets of Land bind an Heir in this caſe, unleſs the Land it ſelf be really tied and charged.

Tenure.

A Man by the Tenure of his Land may be bound to repair a Wall, Bank or other Defence mentioned in this Law, and in proof thereof the Book Caſe of 11 *H.* 7. *f.* 12. is full in the point; where it is ſaid, *That if before the Statute of Weſtminſter the Third, a man had made a Feoffment in Fee; or if ſince that Statute one had made a Gift in Tail, to hold the ſame by repairing a Bridge, the ſaid Feoffee and Donee and his heirs ſhould have been bound by the ſaid Tenure to repair the ſaid Bridge*; and with this agree the Books of 12 *H.* 7. 18. *and* 24 *H. Br. Caſe fol.* 9. and in *Porter's* Caſe in Sir *Edward Cook's* firſt Report, it is ſaid, *That if Lands were given to repair Ways, Bridges, Calceys or ſuch like, this doth bind the Owners of thoſe Lands to do thoſe repairs in perpetuity:* And in the Caſe of 12 *H.* 4. *fol.* 7. the Prior of St. *Marks* in *Briſtol* was obliged and bound by the Tenure of his Land to repair a common Sewer: and this enough to ſatisfie this point.

11 *H.* 7.

12 *H.* 7.
24 *H.* 8.
Porter's Caſe.

12 *H.* 4.

Covenant.

SO likewiſe a man may be bound by his Covenant to repair a Wall, Bank, Sewer or other ſuch like matter, and he may bind himſelf and his Heirs to do the ſame; but yet this Covenant will not bind his Heirs after his death, unleſs there be left aſſets in Fee ſimple to deſcend to the ſaid Heir

28 & 29 *H.* 8.
Dyer, fol. 33.

Heir from the ſaid Anceſtor which made the Covenant.

Wherein I take this difference between a Covenant to bind an Heir, and a Preſcription; for by Covenant the Heir ſhall be bound to the repairs, if he have aſſets deſcended to him from that Anceſtor; but the Heir ſhall not be bound by Preſcription to repair, though he have aſſets deſcended from his Anceſtor who repaired the ſaid Defences: But if Land be charged therewithall by Tenure or otherwiſe, as a charge impos'd upon Land by preſcription, then the ſaid Lands are therewithall chargeable *in cujuscunque manus devenerint, quod nota.*

Leſſee for years of Lands within a Levell, ſubject to be drown'd by the Sea, covenants with his Leſſor to pay all Aſſeſments, Charges and Taxes, towards or concerning the reparation of the premiſſes: A Wall which was in defence of this Levell, and built ſtraight, was thrown down by a ſudden and inevitable Tempeſt: By order of the Commiſſioners of Sewers, a new Wall was built in the form of a Horſhoe; and the Commiſſioners taxed every man within the Levell, and among others a Leſſee for years, whom they alſo truſted with the collection of all the money: Leſſee for years dies, the leaſe being within a ſhort time of expiration; His Executor enters into the Land, and the Commiſſioners charge him with the whole, and the years immediately after expire: And it was reſolved that the Covenant doth bind the Leſſee, and that the Commiſſioners may take notice of it, and tax the Leſſee totally for his Land, without

out

out laying any thing upon him in the reverſion; for the Covenant doth extend to this new Wall, and the making of it in the form of a Horſhoe, is not material, ſeeing it was adjoining to the Land: and although the new Wall be not parcel of the Premiſſes, as it was at the time of entring into the Covenant, becauſe the Wall then in *eſſe*, and to which the Covenant did extend, was a ſtraight Wall, yet according to the words of the Covenant the Tax is towards the reparation of the Premiſſes: And *Bramſton*, Ch. Juſt. took this difference, that if a Stranger covenants to pay charges towards repairing ſuch a Wall, that that is not within the Commiſſioners juriſdiction, becauſe he is a mere Stranger, and not within their Commiſſion, and therefore they cannot take notice of ſuch a Covenant; but otherwiſe it is where the Covenantor is the occupier of the Land, for there the Perſon and the Covenant are within their juriſdiction, and they may tax him for reparations according to his Covenant: It was likewiſe reſolved, that the charge upon the Executor was legally impoſed; And whereas it was objected, That the term was determined, and peradventure the Executor hath not aſſets: It was anſwered, That the Executor was an occupier at the time of the Decree, and therefore was within the words of the Commiſſion; And he having not

not alledged before the Commiſſioners, that he had no aſſets, he hath loſt that advantage, and it ſhall be intended that he hath aſſets, by his not gainſaying it: And accordingly the Court confirmed the Commiſſioners Decree againſt the Executor, *March* 198, 199, 200, 201.

43 *El.* 4. It appears by the Statute of 43 *El. cap.* 4. That if Lands, Rents, Annuities, Goods or Chattels, be given towards the repairing of Bridges, Ports, Havens, Calceys or Sea Banks, that the ſame ſhall be ſo employed by that Statute: So that Goods, Chattels and Annuities, be chargeable to theſe repairs by the force of that Statute, as well as Lands, Houſes and Grounds, in caſe any ſuch thing ſhall happen to come before the Commiſſioners of Sewers, and they may compell the performance, *March* 200.

But note beſides all the former matter, That an Heir ſhall not be bound by the Covenant of his Anceſtor, though he have aſſets deſcended, unleſs he be bound expreſly by the word *Heirs* in the Covenant.

Uſus rei.

I Now intend to declare where uſe ſhall tie one to the repairs of the Defences mentioned in this Law (I do not hereby mean that uſe which I have formerly mentioned in Preſcription and Cuſtome, which is uſe to repair) but the uſe I intend in this place, is, the uſe which one is to have of the defence or thing which is to be repaired: As where one and his Anceſtors have uſed to have the uſe of the River or Waters by ſailing up and down the ſame, or have uſed to have a Ferry on or over them, or a Staith to go up and down, or a Crane to draw up Waters, or ſome other Engine to draw up the Waters for the uſe of their Houſes; Theſe uſes which men have of theſe things may be cauſes

and

and conſiderations ſufficient to tie them to the repairs of the Walls, Banks and Rivers: And for warrant in this learning is the Book of 37 *Lib. Aſſiz. plac.* 10. for there were ſome perſons which were bound to repair the River, becauſe they had paſſage on it with their Boats, and others were charged becauſe they had free fiſhing in the River; and in my Opinion it ſtands with good reaſon, and agreeable to Law, That thoſe perſons, before others, ſhould be bound and tied to the repairs of ſuch things whereof they have peculiar and ſeveral profits and uſe of more than others have: And it is manifeſt, that this very Statute aims full at this point, when it directed that ſuch perſons ſhould be rated, taxed and ſeſſed towards the repairs, which had profit of fiſhing and other Commodities in the Rivers. 37. *lib. Aſſiz.*

But leſt ſome may miſtake my meaning and learning alſo in the ſaid former Caſes, I will therefore make the ſame plain by diſtinction, which is this, That Frontage, Ownerſhip, and this uſe I laſt ſpake of, do not bind any to the repairing and maintaining of Walls, Banks, Bridges, Sewers or other Defences, when and where any other man or Corporation be bound to do the ſame by Preſcription, Cuſtome, Tenure or Covenant: For the ſaid three parts, Frontage, Ownerſhip and *Uſus rei*, be but implicite ties onely in conſtruction of Law, and ſerve the turn onely when no other perſon or perſons are bound expreſly thereunto; and this diſtinction may be maintained by the Book of 8 *H.* 7. *fol.* 5. and other Books, where it is ſaid, *That he whoſe Grounds are next adjoining is bound to repair, unleſs ſome other be bound to do the ſame by Tenure or Preſcription:* Whereby it followeth, that if one be bound to do the ſame by ſpecial Tenure or Preſcription, it freeth the Frontager. 8 *H.* 7.

Note alſo another difference, that in caſes where a Frontager and one who hath *liberum paſſagium* on the River, and a man which hath a free Piſcary there, are not any one of them bound to make the repairs alone, but all alike together; and ſo is the Book of 37 *Aſſiz. plac.* 10. and I ſuppoſe

37, 38 *Assiz.* pose the Book of 38 *Assiz. plac.* 15. maintains this point with me; for there the Law is declared to be, *That he which is bound by prescription to repair, is bound peremptorily alone to do the work, and not any other; and if no such person can be found, then the parties whose* Grounds *do adjoin, and those which have free fishing in the* River, *and free passage thereon, be all of them to do and perform the same jointly, and no one of them is a discharge for the other, because they shall be in* consimili casu. So by this which hath been said touching these matters, the Commissioners may see and behold how carefully and understandingly the Laws of this Realm have indeavoured to do equal Justice; and my desire is, that they would as carefully put them in execution.

A Township assessed.

IT hath been held for a great question, Whether a Townships or Hundred in general might be assessed and taxed to the Sewers, without imposing the same on particular Persons? And Sir *Edward Cook* in the Case of the Isle of *Ely*, is of opinion directly, That a Tax, Rate or a Sess could not, nay might not be set or imposed upon a Town, or upon the Inhabitants of a Town; for, saith he, *The taxation, sessment or charge ought to have these qualities; It ought to be according to the quantity of their Lands by number of Acres and Pearches, or by the tenure of profit of fishing and Common of Pasture, which if it should be laid upon a Town, it would hold none of those proportions*: and his opinion is not alone in this very point, for in the ancient Charter of *Rumney Marsh, pag.* 50. it is said, *Quod unusquisque proportione, ac periculo incumbentium æquè contribuat*; And *page* 12. and 39. of the same Charter, the Taxation is expressed to be by Acres, Perches and Carucates; and our Statute in expres words is, *And all those persons and every of them to tax and assess, charge, distrain and punish, as well within the Limits, Leets and Bounds of old time accustomed, or otherwise, or elsewhere within this Realm of* England, *after the quantities of*

Case of the Isle of *Ely.*

Rumney Marsh Case.

of their Lands, Tenements and Rents, and by the number of Acres and Perches, and after the rate of every perſon's portion, tenure or profit, or after the quantity of their Common of Paſture, or fiſhing, by ſuch ways and means as you the Lord Fitzwilliams, *Sir* Francis Vane, *and Sir* Thomas Mounſon *Knight and Baronet*, *Sir* Edward Dimock, *Sir* William Armin, *Sir* Thomas Grantham, *Sir* George Fitzwilliams, *Knights*, Richard Totheby *and* Edward King, *Eſquires, whereof three to be of the* Quorum, *ſhall ſeem moſt convenient:* Theſe words literally taken, afford the conſtruction to be according to the opinion of Sir *Edward Coke.*

And of the ſame opinion with Sir *Edward Coke, viz.* that a whole Townſhip cannot be aſſeſſed upon the Commiſſion of Sewers, Juſtice *Dodderidge* declared himſelf to be in the Caſe of *Hetley verſus* Sir *John Boyer* and others, *Hil.* 11 *Jac. B. R.* and his reaſon was, becauſe then upon ſuch an aſſeſſment one man may be charged with the whole; *Bulſtrode* 2. 199. *Cro. Jac.* 336. And *Roll, Mich.* 1649. in the caſe of the Inhabitants of *Outwell*, held that a Tax impoſed by the Commiſſioners of Sewers ought to be particular, and not to be laid upon the Townſhip; unleſs there were a particular cuſtome for ſuch Townſhip to be ſo rated or taxed, *Style* 179.

But on the other part I find by many ancient Books and Authorities of the Law, that Taxations and Charges have been generally laid upon Townſhips and Hundreds in matters of this kind, as in the 37. *lib. Aſſiz. plac.* 10. Four ſeveral Townſhips were charged with the repairs of a River, becauſe they had paſſage thereon with Boats; and in 38. *lib. Aſſiz. plac.* 15. a Townſhip was there charged with the repair of a Bridge: And the Statute of *Magna Charta, cap.* 15. 37 & 38 *Aſſiz.*

quod nulla villa nec liber homo distringatur facere pontes nisi qui ab antiquo facere consueverunt; so that if *ab antiquo* a Township had used to repair Bridges, it was tied thereunto by the implied construction of this Statute: And the Statute of 22 *H.* 8. *cap.* 5. gave authority to Justices of Peace to charge a County, Hundred or Town with the repair of Bridges, if no certain Person were specially tied to the repair thereof: and many times in ancient Statutes and Books of our Law, we shall find Townships and Hundreds charged generally, as in *Doctour* and *Student*, *fol.* 74. a Townshiip was amerced; and by the ancient and famous Statute of *Winchester* a Townshiip shall be amerced for the escape of a Robber by the High-way: And 3 *Ed.* 3. Title *Corone* in *Fitz. pl.* 293. a Townshiip was amerced for the escape of a Murtherer; and in 11 *H.* 4. 2. *Brook* 94. a Town was sessed for the expences for the Knight of the Parliament, and it might be levied on any Person's goods of the Town; and this was for the uncertainty of the Persons, and for the infiniteness of the number of them, as it is said in *Richard Godfrey*'s Case.

22 *H.* 8. 5.

Dr. and *Student.*

Stat. *Winton.*

Fitzh.

Brook.

But it may perhaps be objected on the other part, That if a Town or Hundred may be jointly taxed, then it might so come to pass, that one Man's Goods which had no Grounds subject to the charge, and which could reap nor take any hurt thereby, might come to be distrained for the whole tax, rate or sess of the Town; and another man which had great quantities of Grounds there subject to danger might escape free; and therefore such exposition to be made of the said Law, were not within the rule and compass of equality.

And another objection may also be made, That it is true, that by an express Statute or Custome, an assess, rate or tax, may be laid upon a Town or Hundred, as was done by the said Statute of the 22 *H.* 8. and others formerly mentioned; but such exposition were contrary to the letter of this Statute of 23 *H.* 8. of Sewers.

Ido

I do confeſs, that if theſe two objections could not be anſwered, I ſhould change my Opinion: It is true: That if a tax or ſeſs had been ſet upon a Hundred by the ſaid Statute of *Wincheſter*, for the eſcape of a Robber, and that charge had been levied upon one man's goods of the Town, as it might have been, he had had no remedy to cauſe his fellow Townsmen to be contributers to him to bear equal ſhare with him; and ſo if the party robbed had recovered by Action againſt the Hundred, and the goods of one in the Hundred had been taken in execution, he had no means to get contribution: And yet that Law carried that defect with it three hundred years, or thereabouts, till in the 27th year of Queen *Eliz. Chap.* 13. wherein Order was taken, 27 *Eliz.* 13. that if ſome one or few mens goods were taken in execution upon the recovery in an Action taken againſt the Hundred by the party robbed, he or they ſhould have contribution, which before that Statute of 27 of *Elizabeth* could not be had.

But to give anſwer to the two objections; Firſt, if in our caſe of the Sewers, a Townſhip ſhould be Taxed, yet this Tax could not be taken or levied, but onely of ſuch as had grounds within the charge, which had good by the repair, or might have hurt by the neglect thereof; for in 11 *H.* 4. *fol.* 35. it is ſaid for Law, *That if a Town be aſſeſſed* 11 *H.* 4. *f.* 35. *in the Tax, and the Collector doth diſtrain the goods of a man of the Town who was not chargeable thereto, that party may have and take his Action of Treſpaſs againſt the Diſtrainer and Collector, for that he at his peril muſt look well to it, that he whoſe goods were taken were ſubject to the charge.*

So in our caſe of the Sewers, if the goods of one which was not ſubject to the Tax or Aſſeſs impoſed were taken, he might have his Action of Treſpaſs againſt the Diſtrainer, and ſhould recover his damages thereby; ſo this ſalve cures one of the ſaid maladies.

But then the caſe goes farther, *That if the goods of one man of the Town ſhould be taken for the whole Seſſe of the Town, and he is ſuch a perſon as in truth is chargeable there-*

unto,

unto, he can have no Action againſt the Diſtrainer for taking his Cattel, for he is ſuch a perſon as cannot excuſe himſelf but that he is chargeable: This indeed draws the Caſe to a deſperate iſſue, for this ſeems to be as great a miſchief as ever the Statute of *Wincheſter* did ever ſuffer, which was remedied by the Said Statute of 27 *Eliz.* but our Caſe hath not ſuch a Cure provided; Therefore it puts me to the old adage of Law, *Better it is to ſuffer a miſchief to one or more particular perſons, than to permit an inconvenience to the whole Commonwealth which concerns a multitude:* But yet I ſhall give this objection a better anſwer, I hope, than with an old adage; for in our Caſe the party whoſe goods are taken for the whole town, is not without a fitting and convenient remedy; for when his goods be taken and he is conſtrained to pay the whole ſeſſment of the Town, he may make his complaint to the Commiſſioners of Sewers, and may give in the particular names of every Townſman, and the quantity of each mans Eſtate which be charged thereto, or the true value of their Lands, and may crave of the Commiſſioners of Sewers for to make a Law to make them all to contribute, every one according to his portion of Land: And in my Opinion the Commiſſioners of Sewers have power to impoſe a proportionable rate upon every of them, according to the quantity and quality of his ground, by way of contribution, and may award Proceſs to force and compell them to pay the ſame to the ſaid party; whereby it plainly appears, that the party ſo diſtrained hath a direct remedy to come by his loſſes. In *Doctor* and *Student* a whole Town was amerced, and they met together by common conſent, and aſſeſſed and rated every man equally according to his ability, and allowed of as a good cauſe.

But Commiſſioners of Sewers may if they can come to the knowledge of the certainty of every man's Eſtate, rate in the primary and original Seſſe every perſon according to his ſeveral quantity of Eſtate, which may be done in this manner, when the Commiſſioners be agreed how much to lay upon ſuch a Town, then to ſend for three or four of the

Inha-

Inhabitants, and cauſe them to give in every man's Eſtate; and to make and appoint them Seſſors to rate every man, or elſe the Commiſſioners themſelves, having true intelligence of every man's Land, may eaſily ſet the rate and charge upon every particular perſon in an even and proportionable ſum; and thus every man at the firſt ſhall know his own rate, as in the aſſeſſing of the Subſidy, and no man ſhall be burthened with his Neighbours charge; and theſe were good courſes to be uſed within both the letter and ſenſe of theſe Laws: And this courſe was uſed by the Four and twenty Jurators in *Kent* in *Rumney Marſh*, who alwaies upon their Oaths ſet down every particular man's grounds in certain, and their juſt quantities, and accordingly were the parties ſeverally taxed. *Chart.* of *Rumney.* *pag.* 50.

And if the Commiſſioners of Sewers do in the primary and original ſeſs, rate every Perſon according to his ſeveral quantity of Land, they ought (as it ſeems) to deſign in certain the Perſon whom they tax: And therefore by the opinion of *Roll*, *Paſch.* 23 *Car.* 1. if they tax a Man and his Aſſigns, or the Land of ſuch an one, and his Aſſigns, that is too generally expreſſed, and the tax ill; for there is no rule how to levy the money equally upon ſuch a tax, *Style* 13. And whereas afterwards in the Caſe of the Inhabitants of *Outwell*, *Mich.* 1649. it was ſaid by *Roll*, That ſuch tax ought to be laid upon the number of the Acres, and not upon the Perſons of the Inhabitants, *Style* 185. By that I conceive he means, that in the taxation of every man the Acres ought to be ſet down, in reſpect of which he is taxed: For otherwiſe if the

Perſons

Perſons ſhould not be named in the tax, there could be no diſtreſs taken of the Goods of the Owner of the Lands (for the uncertainty who is Owner) unleſs upon the Lands themſelves which are charged; which would be inconvenient, and a great obſtacle to the execution of this Commiſſion.

Howſoever the Tax in my Opinion generally impoſed upon the Town is good, as appears by many Authorities and Books before remembred, even by this Statute, as well as by Cuſtome; for in the ſaid Book of the 37 and 38 *lib. Aſſiz.* it doth not appear that the Townſhips there rated were ſo taxed by any Cuſtome, but meerly by the Law of the Land; and ſo is the learning delivered to be in the Council's Order aforeſaid.

37 & 38 *lib. Aſſiz.*

And I do remember, that at the Aſſizes held at *Lincoln* in *Anno* 12 *Jacobi*, in a Tryal before Sir *Edward Cook* then Judge of Aſſize, in the Caſe of Sir *Philip Conisby* Knight, the Town of *Mauton* was aſſeſſed five pounds, and *Twigmore* as much, and a diſtreſs was taken for non-payment thereof, and was juſtified in a Replevin, and the verdict paſſed for the diſtrainer, and no great ſcruple was then made of the ſaid Aſſeſs laid and impoſed generally upon the Towns; which Caſe I ſpecially noted, becauſe it was tryed and paſſed for current before the ſaid Sir *Edward Cook*, who had the year before reported the Law in his *Tenth Report* to the contrary. And I am alſo of Opinion, that if a new defence be agreed to be made, as a Wall, Bank, Sewer or any other, and a Seſſe is appointed for this work, and laid upon a Town, That the ſame is a good Seſſe and well laid, as well as in the Caſe of old repairs, where Cuſtome may give Warrant unto it, and the Commiſſioners in their diſcretion may ſo do in imitation of the ſaid former rules and preſidents, and it ſtands with good wiſedom and diſcretion to imitate and follow ancient and approved Laws and Statutes

tutes made in Parliament, which are done by the wiſedom of the whole Realm: And in my conceit a decree made which hath no reference or dependency to former preſidents, may be doubted whether it be legitimate or not, having no ancient Laws to patronize it. And thus I conclude my third point of my Caſe, That a Townſhip may be taxed by the Laws of Sewers.

Tythes.

HERE is likewiſe in my Caſe a Parſon rated and ſeſſed for his Tythes, and is now to be put to the queſtion, Whether by theſe Laws he may be taxed for them, or not. The ancient Commiſſions of this kind have very ſtrict words in them to tie every one to the charge of theſe Defences, being for the preſervation of the Commonweal; and this Statute extends it ſelf with a long and large arme to fetch and reach every Man that hath Grounds lying within the Level, and which partake of the good which the Defences bring to them, to be contributory to the charge.

It is true that Eccleſiaſtical and Spiritual Perſons, as Parſons and Vicars hold their Eccleſiaſtical Livings exempt *ab omni onere ſeculari*, for they do not hold their Churches of any Lord, but of the Lord of Heaven, in reſpect of the ſpiritual ſervice they doe therefore: And I take it that Parſons and Vicars hold not their Churches in free Alms, for then the Founder ſhould be their Lord in point of tenure and ſervice, which I have not obſerved to be ſo in any: And in our Law-books it appears, that ſpiritual Perſons were exempted from lay and temporal charges, as in *Magna Charta, cap.* 14. *A ſpiritual Perſon ſhall not be amerced according to his ſpiritual Living:* In *Fitz. Nat. bre. f.* 228. there is a Writ directed by the King to his Officers and Miniſters, forbidding them that they take not any Toll, Murage or Pontage of eccleſiaſtical Parſons, Vicars and ſuch like; and the ſaid Writ ſheweth, that by the Cuſtome of

Mag. Ch. 14.

Fitz. Nat. bre.

the Realm no ſuch exactions ought to be taken of them: And there is another Writ there to diſcharge them for paying Cuſtoms *de bonis ſuis Eccleſiaſticis vel de aliis pro ſuſtentatione ſua emptis*; And alſo they have this privilege, That the Sheriff nor any Lay-officer are not permitted to meddle with their eccleſiaſtical Poſſeſſions; for in 20 *H. 6. fol.* 20. and in many other Books, it is held, that in a Writ of Summons the Sheriff may not ſummon a ſpiritual Perſon on his Spiritualities, but he muſt rather return that he is *Clericus beneficiatus non habens laicum feodum*; and upon this return the Party is to take a Writ directed to the Biſhop, to ſummon him on his Spiritualities: And therefore if the Poſſeſſions of ſpiritual Perſons are had in ſuch great eſteem in our Law, what then ſhall be done with Tythes which are ſaid to be due *Jure Divino?* I have not read that they ſhall be charged to any thing but to the repair of the Temple; in the 18th Chapter of *Numbers*, the 21, 22, 23, 24, 25, 26, 27, and 28th verſes, The Lord ſaid, *I have given to the Children of Levi all the Tenth in Iſrael for an Inheritance*; and yet the *Levites* paid a Tenth thereout to the Prieſts; and ſo Clergymen in times paſt paid a Tenth to the Pope; and in imitation, or rather in reformation thereof by the Statute of 26 *H.* 8. *cap.* 3. the like is now paid to the King, as ſupreme Head and Governour of the Church here on Earth: So here be charges paid out of the Tythes, but they be ſpiritual charges. And in Mr. *Selden*'s Hiſtory of Tythe, *pag.* 13. it appears by collection and connexion of Stories divine, That the firſt or the firſt year Tythe was paid to the *Levite*, The ſecond to the Feaſt at *Jeruſalem*, and the third to the Poor: And had not the Statute of 43 of *Eliz. cap.* 2. made the Parſon and the Vicar liable and chargeable to the relief of the Poor, which was in imitation as it ſeemeth of the *Moſaical* Law, they had not been bound or tied to doe the ſame; for it is held to be more charity to relieve the Church than the Poor: And in payment of Taxes and Subſidies they are granted in their Convocation-houſe, a Council merely conſiſting

20 *H.*6. *f.*20.

18th *Chapter* of *Numbers.*

26 *H.* 8.

Selden.

43 *Eliz.* 2.

conſiſting of the Clergy, and then are confirmed in Parliament, of which Houſe alſo they are a Member. And therefore in my opinion, ſeeing Tythes are ſo ſacred a duty, that a Lay-man could not have any help for at the Common-law, and were exempt from temporal and prophane uſes, I am therefore of opinion, That they are not to be rated or taxed by the general words of theſe Laws; Yet I am of opinion, That Tythes in the hand of a Temporal or Lay-man are to be rated by theſe Laws, for when they are come into his hands, *Tunc res ſpirituales fiunt temporales & tranſeunt decimæ in Catalla.*

But I muſt here leave theſe Eccleſiaſtical perſons and their Church livings: There is another point of this Law will reach unto ſome of their poſſeſſions, as to their Glebe Lands which belong to their Churches, and their Meadow and Paſture grounds, for theſe be not ſacred, as Tythes be, But came to them by the benevolent gifts of Laymen, and not *ex dono dei & evangelii* as Tythes did; and ſo they took that burthen with them from the Lay-donor, which after may be impoſed upon them: And therefore ſuch Parſons, Vicars or other Spiritual perſons which hold a plough Land in *Culture*, are chargeable by the Statute of 2 *Mar.* towards the repair of the High-ways, as other Lay men be: But in that Statute there be Eccleſiaſtical Officers uſed, as Churchwardens, whereby it was conceived, that that Statute had an eye to bring Eccleſiaſtical perſons within the reach of it: And ſo for their houſes and grounds I take them to be within theſe Laws of the Sewers, for the King's own Lands are alſo chargeable thereunto, and yet on earth within His Dominions He is ſaid to be *caput Eccleſiæ*, and as much reaſon were it to exempt His poſſeſſions as theirs, if the reſpect of the perſon ſhould bear any ſuch ſway in the Caſe. 2 *Mar.*

Alſo I do find by divers ancient Records, That Abbeys, Priories, and other Spiritual poſſeſſions, have been chargeable to the repair of Bridges, Calceys, Banks and Highways, by Cuſtome and Preſcription, as appeareth alſo by the Books of 11 *H.* 4. *fol.* 82, 83. and 44 *Ed.* 3. *Fitz.* Title *Bar.* 11 *H.* 4. 44 *Ed.* 3.

Bar. pl. 301. and I take it, that by a very expreſs and ſpecial Cuſtome or Preſcription, a portion of Tythes in a Clergy mans hand may be charged with the repairs of Bridges, Waies, Walls or Sea Banks, but not without a direct affirmative Cuſtome; for I ſuppoſe that they may as well indure a charge in this kind, as a charge in a *Modus decimandi.*

And ſo I conclude this part of the Caſe, That the Parſon was not to be ſeſſed for his Tythes by the general words of this Law.

Notwithſtanding the opinion of our Reader here; It ſeems that Tythes, though in the hands of a ſpiritual or eccleſiaſtical Perſon may be rated or taxed by the Commiſſioners of Sewers by the general words of the Statute of 23 *H.* 8. 5. For it was reſolved 5 *Car.* 1. by all the Judges of *England* (as Sir *Nicholas Hyde*, heretofore Chief Juſtice of the *Kings Bench*, reported) that Tythes are at this day chargeable with all charges impoſed by any Act of Parliament, wherein they are not particularly excepted, as upon the Statute of 43 *Eliz.* to the Poor, to maimed Souldiers, *King's Bench*, *Marſhalſey*, Bridges, *&c. Parſons* Counſellor, *part* 2. *cap.* 15.

A Copyholder.

HERE is alſo a Copyholder taxed within my Caſe for his Copyhold Land, and whether he for his Copyhold, and the Lord for the Freehold of that ſoil, ſhall be aſſeſſed therefore, is another queſtion.

A Copyhold by the Cuſtome of the Manor yieldeth and affordeth to the Lord Seigniory Rent, Fines due upon admit-

admittances, and ſuch like duties; but the Copyholder hath the real and viſible profits of the ſoil, and therefore both Lord and Copyholder receive *Et commodum & ſalvationem*, by the ſaid defences: And therefore the words of this Law be exceeding copious and full in this point of ſeſs (*viz.*) To inquire who hath and holdeth any Lands or Tenements, or Common of paſture, or fiſhing, or hath or may have any hurt, or damage or loſs by any means, in or near the ſaid places; and in this caſe the Lord holdeth the ſaid Land in Tenure, though not in *Culture*, and many ways may have hurt and damage; As if the Copyhold were overflowed by the Sea, the Lord ſhould loſe his Freehold of the ſoil, his Seigniory, yearly Rents and Fines for admittances, and all other *perquiſites*: So that the ſaid words of this Statute beat mainly upon him. But as there be reaſons to be urged againſt him, ſo there be matters to exempt him from this charge, and to lay the burthen on the Copyholder.

1. Firſt, though he be Lord of the Copyhold, yet he is ſeized of the Freehold thereof, but in Imagination and conſtruction of the Law, for the Copyholder is pernor and taker of the viſible and ſubſtantial profits.

2. Secondly, the charge of repairs reſpects the poſſeſſioner *in preſenti*, which is eaſie to be found out, and not imaginary owners as the Lord is.

3. And Thirdly, if the Lord and owner ſhould both be charged *pro una eademque re*, which the Law doth never permit, for this is not like the Caſe of Lord and Commoner, they there ſhall be charged, the one for his ſoil, and the other for his Common; for in this Caſe the Lord is the immediate proprietor of the Soil, and he hath the preſent and real occupation thereof, as well as the Commoner hath the uſe of his Common; and therefore they ſhall both be taxed to theſe repairs *diverſis tamen reſpectis*.

But for the Copyholder it may be objected, that he is not within this Statute; for in *Heidon's* Caſe in Sir *Edward Cooks* 3d *Report*, it is truly ſaid, *That a Copyholder is not within the Laws and Statutes which alter the Service, Tenure, Intereſt.* *Heidon's* Caſe.

Intereſt of the Land, or other thing in prejudice of the Lord; and this is the cauſe that a Copyholders Lands cannot be extended or put in execution upon the Statute of *Weſtminſter the Second*, nor in extent upon the Statute of *Acton Burnel* and *De mercatoribus*, for if they ſhould, then might the Sheriff make the Lord new Tenants, without ſurrender and admittances, which is contrary to Cuſtome, the life and eſſence of all Copyholds; yet there is another good rule put in the ſaid Caſe of *Heidon*, that is, *That where a Statute is made for the general good and wealth of the Realm, and that no prejudice can come to the Lord by alteration of Tenure, Service, Eſtate or Cuſtome, there Copyholds may well be within thoſe Statutes*; Therefore now it is to be conſidered, whether this Statute of Sewers will in any ſort hurt or prejudice the Lord or no; for it is certain, that theſe Laws tend as much to the wealth and welfare of this Realm, as any can do; and in rating and aſſeſſing theſe Copyholds to the repairs of Banks, Walls and Sewers, *&c.* it alters neither the Copyholders Intereſt, nor the Lords Tenure, nor doth it in any ſort prejudice the cuſtome of the Manor.

But then it may be objected, That if ſeſſe be impoſed upon a Copyholder for his Land, and be not paid, theſe Laws give ſale of Lands, which indeed is the onely clauſe of this Statute which is material, to exempt a Copyholder out of theſe Laws; for clearly I take it, That Commiſſioners of Sewers have no power to decree the Copyhold Land away for non-payment of the ſeſſe: Yet I am of Opinion, that a Copyholder, though he be not within that part of the Statute which giveth ſale of Lands, yet he is within the other part thereof, for divers Reaſons.

One I find by experience, and in divers preſidents, that many Copyholds have been and be charged with repairs of Bridges and other Defences in divers parts of this Realm by Cuſtoms: Alſo if a Lord grant a Copyhold to *J. S.* and his Heirs by Copy, *Tenendum* by the repairs of ſuch a Wall, Bank or Bridge, this bindes this Copyhold thereto in point of charge.

And

And laſtly, this Statute bindes ſuch to the repairs which may have good by the doing, or hurt by the neglect: And it is apparent, that by overflowing or inundation, a Copyholders Land ſuſtains equal damage with other Lands; and for theſe Reaſons I reſolve that a Copyhold is within theſe Laws: And ſhortly touching Copyholds, I do confine them to theſe four heads.

My four Tenents concerning Copyholds.

1. Firſt, a Copyholder is ſeſſable towards theſe repairs for his Copyhold.

2. Secondly, that the Lord of the Copyhold is not to be taxed for the Soil of the Copyhold; for although he might come to it by forfeiture committed, yet that is a foreign poſſibility: and although he be ſeized in Law of the Freehold, yet becauſe the Iſſues and Profits go with the Copyholder, this Law therefore will not charge him for the Soil.

3. Thirdly, in reſpect the Copyhold rent is a rent of Aſſize, and rents be within the expreſs letter of this Statute, and becauſe his rents by the overflowing of the Sea be loſt, therefore the Lord ſhall be aſſeſſed for it if it be of value.

4. Fourthly, I am of opinion, that a Copyhold may not be ſold by the Commiſſioners of Sewers, and yet Copyholders be within other parts of this Law.

Now becauſe it is a high point in this Statute, in what manner to rate, tax and aſſeſs by the judicious power of theſe Laws: and in regard my Caſe toucheth all manner of Seſſes and Rates which be or may be impoſed by theſe Laws, I will therefore ſpread it abroad: and I do intend to treat of what Lands and other things are to be aſſeſſed, towards the repairs in my Caſe, and what perſons to be aſſeſſed, and in what degree.

Wherein firſt I am of opinion, that one is not to be aſſeſſed for his high and deſcending grounds, for ſo it appears was the opinion of *Brudnel* in the 12 *H.* 8. *fol.* 3. where he ſaith, *That if a man's ground be ſurrounded with Waters, he may make a trench in his own grounds to let the Water run down-* Regiſter.

downwards, and to deſcend upon his neighbours grounds, for water is an element deſcendable (jure naturæ) And alſo high deſcending grounds can have no ſuch uſe of Walls and Banks, as other grounds ſituate lower may have, for the Waters can have no force againſt them, and therefore the owner is not chargeable therefore; and the words of the Commiſſion expreſſed in the Regiſter be, *Qui defenſionem Commodum & ſalvationem per Predictas Wallias, Gutturas, Pontes, Calceta & gurgites habere poterint nullatenus parcantur.* And the Charter of *Rumney Marſh* ſeems to bear the ſame ſenſe *(viz.) Quod pro ſecuritate dicti Mariſci diſtrictiones fiant ita quod æquè fiant ſecundum portiones majores & minores quas homines habent in eodem Mariſco*; But high grounds by nature need not Engines of art to defend them: And in *Rook's* Caſe in Sir *Edward Cook's* 5th *Report*, and *Keighley's* Caſe, it is truly declared, *That the grounds lying on the Level which are in apparent danger ſubject to ſurrounder, are onely chargeable to repairs by this Law*; But yet grounds lying on high Mountainous places may be by Cuſtome, Preſcription or Tenure liable and ſtand chargeable to repairs of Walls, Banks, Sewers, Goats and other Defences: And in ſuch caſes though they be never ſo high, yet theſe Laws will reach unto them, but no charge is to be impoſed on them by this Statute, and by force thereof onely, without a ſpecial Cuſtome or Preſcription to warrant the ſame.

Rook's Caſe.

Annuity.

IF a Dean and Chapter or other Corporate perſons or Body Politique be by Preſcription to pay a yearly Annuity to *J. S.* and his Heirs, *J. S.* is not ſeſſable for his Annuity, yet the ſaid Corporate or Politique perſons pay the ſame in reſpect of their Lands which lie in danger of ſurrounding, and ſo the grounds be ſubject to theſe Laws, but it iſſueth not thereout: And the ſaid Corporate and Politique perſons are not charged in their Lands, but in reſpect of their Lands to pay the ſame.

Commons.

Commons.

THoſe perſons which have Common of Piſcary, Turbary or of Paſture in great Fens, Mariſhes and Waſtes, may be charged, but Commoners in *agris ſeminatis* after the corn ſevered, as ſtock Commons which be of a ſmall value, are not to be charged for their Commons, but for their Lands.

Ferry.

HE which had a Ferry over a River was in 37 *lib. Aſſiz. pl.* 10. charged to repair the River, and ſo for a Ferry one may be charged by this Law.

Herbage.

HE which hath the Veſture or Herbage of grounds, as *Prima tonſura vel veſtura terræ*, may be charged to the repairs.

Free paſſage.

IT appears likewiſe, that thoſe perſons which had paſſage for their Boats on the River, were to be rated towards the repairs in 37 *Lib. Aſſiz. pl.* 10. but this is to be intended of thoſe perſons which had free and cuſtomary paſſage thereon, as a liberty and inheritance, and was not meant or intended of poor Boatmen which come thereon with their Boats accidentally, by the general Cuſtome of the Realm.

Parks, Warrens, Chaſes.

A Man for his Park of Deer, and Warren of Conies, ſhall be charged if theſe liberties lie within the Level; but for Chaſes I ſuppoſe one is not chargeable onely, for Deer which be *feræ naturæ* not bound to certain precincts, but in that Caſe the owner is onely to be taxed for the Soil.

Mart, Fair or Market.

ALSO if one have onely the liberty of a Mart, Fair or Market to be kept in a place which is ſubject to ſurrounder, In my Opinion, becauſe they are but caſual in their profits, and not continual in their being, although they be conſcribed to place and circuit, yet being no part of the Soil, nor of the iſſues and profits thereof, they are not taxable within theſe Laws.

Offices.

THE Office of the Clerk of the Market, Town Clerk, or ſuch like, although theſe Officers be confined to a certain place and precincts within the Level which is ſubject to ſurrounder, are notwithſtanding exempt from theſe taxations.

Proxies, Synods.

HE which hath Proxies or Synods of Annual ſums of money, ſuch as was in the Caſe of *Proxies* in the *Iriſh Reports*, is not ſeſſable within this Law; for although the perſon is charged therefore in reſpect of the grounds, yet the ſame doth not iſſue thereout.

The Morgager for the Title he hath by the Condition to reduce the Lands back again to him, or he which hath Title

tle to Land by Action, Condition or Entry, or he which hath a contingent use shall not be taxed for them.

Neither was *Cestuy que use* at the Common Law before the Statute of 27 *H.* 8. of uses, nor is the Bargainee of Land before the Deed be inrolled sessable by this Law. 27 *H.* 8.

Neither is one who hath the presentation or nomination to a Church as Patron, or he which is Founder for his Foundership, Taxable within this Statute, yet they be Tenements, the largest Words of charge within this Law; but the Law intends the immediate possession of such Tenements which be proficuous, and not these things which be Tenements in Law, and which be but conveyances, and their fruit is Ceremony without Substance.

This Law setteth down such things for the which one is chargeable, *viz.* (*He which hath Lands, Tenements, Rents, Common of Pasture, Profit of Fishing or other Commodities, and such as have Safety, Profit, Defence or any other Commodity*) These be the Words of charge recited by this Law: This Word *Land* is of large extent, for it reacheth to Houses, Arable, Pasture, Meadow, Mills, Tofts, and to all other Edifices, Moors, Marishs, Woods, Wood Grounds, for all these the Earth is the substance *Et omne solo cedet*, and the several increases thereof be but qualities.

The Word *Tenements* is of larger extent than Lands; for it containeth all which the Word *Lands* doth, and all things else which lie in Tenure: so that I think it shall be but labour lost to enter farther into the particulars thereof

Lord and Tenant.

IF there be Lord and Tenant, and the Tenant holdeth of the Lord by yearly Rent services, the Lord may be rated as well for his Rent, as the Tenant for his Land, to Annual repairs, as well as to accidental, by reason of these Words in the Statute (that is, *That every one be rated and taxed according to the rate of every persons Rent, Tenure or Profit,*)

here be full words to charge the Lord for his Rent; and ſo Rent charges, and Rent ſeck ſhall be ſubject to ſeſſes in this kind: for otherwiſe the Tenant of the grounds may be undone thereby, in regard the Rents going and iſſuing out of the grounds may amount to as much almoſt as the yearly value of the grounds do: But if the Rents be ſo ſmall as they are ſcarce worth the gathering, then in diſcretion the Commiſſioners may ſpare them, for *De minimis non Curat Lex.*

Alſo whether the remainder man, and he in Reverſion depending upon an Eſtate in Tail, ſhall be rated and taxed, or not, by the power of theſe Laws, is an apt queſtion for this place; and therein my Opinion is, That being dry and fruitleſs Remainders and Reverſions, they ſhall not be ſeſſed to the repairs, but the Tenant in Tail in poſſeſſion ſhall be ſolely charged; for it is more to be feared, that Tenant in Tail will cut off the Remainder and Reverſion by a Recovery, than that the Sea ſhall drown his Eſtate by an overflow.

Leſſee for years, and he in reverſion.

IN the Caſe of the Leſſee for years and for life, and thoſe in Reverſion and Remainder, there is a greater cauſe of diſpute than between Tenant in Tail, and he in the Reverſion: And becauſe it is an often Caſe, I have therefore taken the more pains to reſolve the ſame.

Jeffrey's Caſe. Firſt, the Leſſee is in the preſent poſſeſſion, and ſo is ſubject to all ordinary charges; and with this agreeth *Jeffreys* Caſe in Sir *Edward Cook's* 5th Report; for there the Caſe was reſolved, that where the Inhabitants of a Town were aſſeſſed towards the repair of a Church, there the Leſſee for years was charged, and not the Leſſor, though he had a yearly Rent reſerved.

And the ſame reſolution was by all the Judges of the *King's Bench* in the Caſe of *Paget* and

and *Crumpton*, *Pasch.* 41 *Eliz.* upon view of *Jeffrey's* Case, *Cro. Eliz.* 659.

For in point of the Rent this Case and that will differ, by reason Rents be expresly within this Law; but I now speak of a Lessee where no Rent is reserved: In 17 *Ed.* 4. *f.* 6. a tenth was granted to the King by Parliament, of the value of their Lands, and the Lessee for years was charged therewithall, and so was the Law there taken, if the Parliament had given the tenth part of the issues and profits of the Lands. 17 *Ed.* 4.

The Case of the Proxies in the *Irish Reports* doth in my opinion in reason resemble this Case; for the Case was there, *That the Bishop of* Meath *in* Ireland *had a Proxy of fifteen shillings payable out of the Commandry of* Kells, *then parcell of the Possessions of St.* John's, *all which came to the Crown by the dissolution of Monasteries in that Kingdom; and after the said Bishop granted the said Proxies to Queen* Elizabeth, *and after Queen* Elizabeth *made a lease of the Commandry to Dr.* Forth, *reserving a yearly rent, without mentioning the Proxy*; And it was there resolved, *That Doctor* Forth *the Lessee for years should be at the charge to pay the said Proxy, with all the arrearages thereof which did incur in his time*: And so in the case of a Rent-charge, the Lessee is chargeable, and he is to pay the Tythes, and the Composition-money due therefore: So that these Cases sway strongly against the Lessee for years, to lay the whole charge upon him, and to exempt the Lessor. Case of Proxies.

But yet we must here distinguish and make a difference between annual repairs in ordinary things, and extraordinary repairs. For to furnish the Defence with petty reparations, they shall be laid onely upon the Lessee for years or for life; but if a new Wall, Bank or Goat, or Sewer be to be built new, and erected; or if the ancient Defences be decayed in the main Timber, or in the principal parts thereof, here as well the Lessor as the Lessee shall be put to the charge, for these things be not ordinary and annual

charges,

charges, but do reach from the beginning of the leaſe to the top of the Inheritance: as for petty reparations they are by intendment to continue but for a ſhort time, which are likely to be ſpent during the term and leaſe; but theſe new Defences are apparently done to ſave the Inheritance: And this difference holds good correſpondency with other Caſes in our Law, as in 49 *Ed.* 3. *fol.* 1. and 3 *Eliz.* in *Dyer*, *fol.* 198. and in that Book again, *fol.* 134. and in divers other Books it is holden for Law, That if a Houſe in leaſe decay in the Groundſels, Poſt or Balk, in the great Timber, in direct wearing by tract of time, and not in default of the Leſſee; the Leſſee may take and cut up Timber growing on the Grounds leaſed to repair the ſame, and the Leſſee ſhall be at charges of workmanſhip, for the repairs are in matter of right, and doe the Leſſee good during his leaſe, and the Leſſor after the expiration thereof: And becauſe theſe great repairs extend to both their Goods, therefore they ſhall both be contributory thereto: But if a Houſe be decayed in ſplinting, thack, walling, or in ſuch petty matters, the Leſſee for years ſhall be at the ſole charge, for theſe may be ſpent in his own time.

49 *Ed.* 3.
3 *Eliz. Dyer.*

So I ſuppoſe my meaning is herein well perceived, which is, That in petty, annual and ordinary repairs, the Leſſee alone ſhall doe the ſame; but where the ſame wants in great Timber, or when a new Defence is to be built, they ſhall both be at the charge: And with this the Statute of 7 *Jac. cap.* 20. doth directly in reaſon agree withall; out of which Statute it is plainly to be obſerved, that in the great repairs, as alſo in the new building, as well the Leſſor as the Leſſee ſhall be both at the charge: Yet in the Statute of 3 *Ed.* 6. *cap.* 8. there is a clauſe in effect, *That all Lots, Scots and ſums of money hereafter to be rated by the Commiſſioners of Sewers upon the King's Lands, ſhall be gathered or levied by diſtreſs on thoſe Grounds as in caſe of other Perſons; and that all Bills of acquittance ſigned with the hand of ſuch Receiver or Collector, ſhall be a ſufficient Warrant to the Auditours and Receivers, and other the King's Officers, for allowance*

7 *Jac. c.* 20.

lowance to the Farmer or Tenant to the King's Majesty; Whereby it appeareth, that the Farmer of the King shall not be at the charge, but His Majesty; yet by the Statute 13 *Eliz. cap.* 9. it may be collected, that the Lessee for 13 *Eliz. c.* 9. years shall be charged, but all these are to be reconciled with my said diversity.

But *Heath* Justice *B. R.* in the Case of *Commins* and *Massam* was of opinion that the Commissioners of Sewers may charge the Lessor or Lessee, at their discretion, though it were for a new Defence, *March* 198.

But now it may be objected to me; *Sir, do you think it reasonable or possible for Commissioners of Sewers to take notice at the first of every private Man's Inheritance, and the several Estates which the Parties have therein, when it will scarce be possible by private search to find them out?* Note.

To this I answer, That it is not reasonable to tie the Commissioners to such difficult and obscure businesses; but it is sufficient for the Commissioners to impose or lay the rate, tax or sess on the Grounds, or on the visible Possessours thereof: and if the money so rated be demanded on the Lessee for years, or for life; or if the Goods be distrained therefore, or they be compelled to pay the same, then they may come before the Commissioners, and shew forth their lease, and make it appear, that *J. S.* hath the reversion, and as the case is, to be charged as well as himself; and upon due proof thereof made, the Commissioners upon hearing the Parties on both sides may apportion the tax on either of them, as in justice, discretion and true judgment is requisite. And so if a tax be set upon Land, the Owner may come in before the Commissioners, and make it to appear before them, that *J. D.* hath a Common, and Rent thereout; and upon proof thereof made, the Commissioners are to lay the charge accordingly: And so it shall not tie the Commissioners at the first to lay the charge upon every

every particular Perſon, for that were *opus infinitum & impoſſibile*, but to relieve the Parties upon their complaint; and this may be eaſily done, and it ſtands with the juſtice of theſe Laws ſo to doe: And if the Parties grieved will not complain for relief, let it be juſtly accounted their own folly, and no injuſtice of the Commiſſioners; for the very
1 *H.* 4. c. 12. Statute directs, that ſuch as are grieved ſhall have relief upon their complaints, which confirms my opinion in this point.

Taxes, Rates and Aſſeſſments impoſed merely by the Laws of Sewers.

I Have formerly put nine ſeveral matters to tie men to the repairs, and this, by the Laws of Sewers is the laſt, but not the leaſt of them: I propoſe theſe to be by the Laws of Sewers, becauſe they be not backed, helped, aided or aſſiſted by Cuſtoms, Preſcriptions, Common right, or by any other Rule of the Commonlaw, or by Tenure or Covenant, or any act of the party, as all the reſt be, but are onely compoſed, made, ordered and directed by the ſole power and authority of theſe Laws of Sewers: and theſe are ſuch as fall out of all the former rules, and therefore *in nova cauſa novum remedium eſt adhibendum*: But yet before I enter into my own works, I will ſet down and declare the opinions delivered in *Rook*'s and *Keighley*'s Caſes, which ſeemed one of them oppoſite to the other: for in *Rook*'s Caſe it is ſaid, *That if one be bound in reſpect of his Lands to repair a Wall or Bank by Tenure, Preſcription or otherwiſe, that yet the Commiſſioners of Sewers could not aſſeſs the ſaid party alone to repair the ſame; and ſaid, that the Commiſſioners were not tied to the Rules of Preſcription, Tenure, Cuſtome or otherwiſe, but ought to aſſeſs all the Level to do the ſame, which are to have good thereby*: But this being miſtaken, is very juſtly and diſcreetly altered in the ſaid Caſe of *Keighley* by the Authour himſelf; for how could it be preſumed, that the learned makers of this worthy Law would have ſtricken down

Rook's Caſe. 5 Rep: 100.

Keighley's Caſe. 10 Rep: 139

down at one blow ſo many thouſand Preſcriptions, Cuſtoms, Tenures, Covenants and Uſes, as be within this Realm, which be tied and bound to doe and make the repairs in this kind, ſome in conſideration of Houſes and Land, others for yearly Rents, and for other cauſes, which to have ſet at liberty, and to have impoſed the charge on the Levellers, would have wrought and brought a wondrous innovation, change and alteration in theſe works; all which by this expoſition are freed and ſaved: But yet there be certain Caſes which of meer neceſſity lay the charge upon the Level, which are as follows:

The charge upon the Level.

FIRST, If any grounds were heretofore by Cuſtome, Preſcription, Tenure or otherwiſe obliged and bound to repair any Wall, Bank, River, Sewer, Goat, Sluce, Jetty, or other Defence, which grounds ſo charged have been of late devoured and overflown by the Sea, and ſo remain; The Commiſſioners of Sewers are in that Caſe tied to lay the charge now upon the Level, which ſtand in danger of taking hurt by the not making the repairs, or which are to receive good by the doing thereof. 1.

Secondly, Alſo if *A. B.* be bound by the Tenure of his Land to repair a Bridge, Calcey or Bank, and he dieth without Heirs, whereby the Land eſcheateth to the Lord of the Fee, in this Caſe the Tenure is ended, and the chief Lord is not bound to the repairs, and therefore now the charge muſt lie on the Level, and ſo is the Law if this Tenure had been in other ſort extinguiſhed. 2.

Thirdly, Where no perſons or grounds can be known, which ought to make the repairs by Tenure, Preſcription, Cuſtome, Covenant or otherwiſe, then the Commiſſioners of Sewers are to lay the charge on the Level. 3.

Fourthly, If *John à Stile* be chargeable to make the repairs, and be not able to doe the ſame, here the Level are to be charged to aſſiſt him therein, as appears in *Keighley's* Caſe. 4. *Keighley's* Caſe.

5. Fifthly, If *J. S.* by reaſon of his Lands or otherwiſe be tied to repair the Sea Bank, but the hazard is ſo apparent dangerous to the Countrey, that *J. S.* in all likelihood cannot repair the ſame, and ſo the Countrey might be in danger to be overflown e'er *J. S.* alone could do it, here alſo the Countrey on that Level are to be rated and taxed towards the ſame: *Keighley*'s Caſe.

And ſo *Roll* in the Caſe of the Inhabitants of *Outwell, &c.* if it be to prevent a preſent and publick danger, *Style* 192.

6. Sixthly, If the Sea at the Spring-tides, or at extraordinary caſual ſwelling Tides or Floods, have broke down the fences, and overthrown the Banks, and drowned the Countrey without any default in the party who was tied to have repaired the ſame; the Level ſhall in this Caſe make up the breach, for things which happen extraordinarily by the Sea or great Waters, which neither policy of man could prevent, nor induſtry or force could reſiſt, are counted inevitable and undefenceable: and ſo is the Law in the Caſe of Leſſee for years or for life, if they ſuffer by neglect their Banks or Walls to be broken down, and their grounds ſurrounded, they be puniſhable in an Action of Waſte; But if thoſe grounds by the extraordinary rage and violence of the Sea or Waters be born down, and their grounds ſurrounded thereby, they are in this caſe freed from all Waſtes; and in proof thereof the Caſe in 28 and 29 *H.* 8. *Dyer fol.* 33 is much to this purpoſe, where one made a Leaſe for years of grounds to *J. S.* lying near the River of *Ex*, and the Leſſee covenanted to ſuſtain and repair the Banks of the River to preſerve the Meadow from ſurrounder on pain of ten pounds; yet after an extraordinary flood, the Banks were broken down, and the Meadows were ſurrounded, and it was there holden to be no breach of Covenant, and that he ſhould be excuſed from the penalty: but yet he muſt make and repair the Banks in convenient time.

28 *H.* 8. *Dyer.*

Nota,

Nota, this was in the Caſe of a freſh River, whereby in this Caſe the Law muſt lay the charge on the Level, if any danger be likely to enſue by the protracting of time.

In an Action of Waſte brought in *C. B.* againſt the Leſſee, for ſuffering the Sea-wall adjoining to his Land to be ruinous, *per que per fluxum & refluxum Maris, le terre fuit ſurround*, *Dyer*, Chief Juſtice, held, that though the Leſſee ſhall be excuſed where the Wall is born down by the ſudden violence of the Sea, and the Land ſurrounded thereby, and the ſame could not be prevented; yet if there be a ſmall breach in the Sea-bank or Wall, and the Leſſee doth not repair it, but ſuffers it to continue, ſo that afterwards the violence of the Sea, breaks the reſt of the Wall, and ſurrounds the Land, that in that caſe it is waſte in the leſſee, for it was his own fault, that he did not amend it at the beginning, *Moor* 62, 63. ſee the ſame difference taken by *Dyer* and *Welch* in another caſe, *Moor* 73.

But this difference was not allowed for the Banks of the River of *Trent*, 6 *Eliz.* in the Caſe of *Griffith*, who brought an Action of Waſte, for that the Leſſee ſuffered the Banks of the ſaid River, which ran by the Lands to be unrepaired, whereby the Water brake the Banks, and ſurrounded the Lands; For there it was ſaid by all the Judges, that the *Trent* is not ſo violent, but that the Leſſee by his policy and induſtry, might

have preſerved the Banks, and cauſed the water to have run within its limits, *Moor* 69. ſo that it ſeems in ſuch caſe, where there is neither Sea, nor any extraordinary high ſwelling-waters, but a River of an ordinary and gentle current, ſuch excuſe of the Leſſee is not to be received, but if there be any irruption and ſurrounding, it is waſte.

7. Seventhly, if one do hold his Land by the yearly payment of Ten Shillings towards the repair of a Wall, if this money will not defray the charge, the reſt muſt be laid on the Level.

8. Eighthly, If a new Wall or Bank be to be erected, or a new Sewer, Trench or River to be caſt, or Sluce or new Goat to be built, in theſe caſes the Commiſſioners muſt lay the charge on the Level which are to take benefit thereby, as well for new building thereof, as with the maintaining of them: for in the Caſe of new Defences there can be no Preſcription, Cuſtome or Tenure bound to doe the ſame.

9. And laſtly, In caſe there be a great Port in the Countrey, by the which the whole Countrey hath benefit; for the Ports and Havens, as hath been ſaid, be *Oſtia & januæ Regni*, and are the Defences to the whole Countrey *tempore pacis & tempore belli*, and are thoſe places, by means whereof the upland Countreys be made partakers of the Sea Commodities; therefore in my opinion, the extraordinary repairs of theſe be not altogether tied to the Level, as in other Caſes, nor to preſcription or Cuſtome of repairing, which extends but to ordinary defects, but upon great and urgent neceſſities, for the ſafety of the Port, upon the welfare whereof the ſafety of the Countrey doth depend, the whole Countrey are obliged and bound to contribute towards the repairs, for theſe reaſons following:

First, for that in time of peace it is the Gate which openeth it self to let in from Foreign parts the Ships and Barques, which bring hither to this Island such Merchandizes, Wares and Commodities, both for our profit and pleasure as we have need to use. 1.

Secondly, At these Ports we ship out to Foreign Nations our excess of Corn, Cloth, Skins, Lead and other Wares, wherewithall we do abound, and receive in truck therefore other things more usefull and necessary for us. 2.

Thirdly, In time of War we have shipping here for our Souldiers, and means at the easiest charge to transport them to such Places as the King and Council shall direct. 3.

Fourthly, In those Ports are commonly great Havens, which are the chief receptacles of all our fresh Waters, into which the Waters which drown the grounds of the countries adjoining are conveyed. 4.

And lastly, it appears by divers Authors, that a Countrey well furnished with Ports and Havens, is not more strengthned than honoured thereby; and if it be as lawfull as convenient to put a case of Chronicle Law upon it, in the 28th year *Eliz.* in *Holingshead*'s Chronicles, it appeareth what great care the Queen and the Lords of the Privy Council, and the Knights and Gentlemen of *Kent* took for the repairing of *Dover* Haven, what preparation was made for it, what moneys Levied, and how forward all the Countrey was to effect that work, may be a Spectacle to others for to lend their helping hands to the maintaining of such worthy Works, being of all other the most Honorable to our Nation, and the most usefull to the inriching thereof; for which causes in my opinion, because the Mountains as well as the Valleys have both *Salvationem defensionem & commodum* thereby, therefore in time of need the one as well as the other should be charged by the power of this Commission, to contribute to the extraordinary repairing of the same. 5. *Hol.* Cron.

A Sea-

A Sea-wall was overthrown by a ſudden and inevitable Tempeſt; one within the Level ſubject to be drowned, diſburſed all the money for the building of a new Wall: Afterwards the Commiſſioners taxed every man within the Level for the repaying of the ſum diſburſed, with his damages, *viz.* intereſt for his money, and this matter being diſcloſed upon a return to a *Certiorari*, *Brampton*, Ch. Juſt. and *Heath*, Juſt. *B. R.* were of opinion that this charge was legally impoſed, as well for the damages, as the principal money; And that the Commiſſioners having juriſdiction of the principal, have juriſdiction likewiſe of the damages, which are the acceſſory: For who elſe would hereafter diſburſe all the money in any imminent danger and neceſſity, if he ſhould not be allowed uſe for his money? *March* 198, 199, 200, 201.

I have now proceeded in this point of Seſs ſo far, that I take it, I may Juſtly here make my full period of this days exerciſe; and I have taken up the more time herein, becauſe thereupon a main part and ſtrength of this Law conſiſts: And therefore I will now apply my ſelf to my concluſion, in the which I have already proceeded ſo far, that I have made it in ſome ſort to appear, that ſome of the Seſſes in particular are not well impoſed, as the Leſſee in caſe of the new defences was not alone chargeable, for that he in the reverſion was to contribute thereto, and that no impoſition ought to have been laid upon the Parſon for his Tythes, but the owner of the Soil was to be charged for all; ſo that theſe two be already ruled for me: But yet if any of the Seſſes ſhould be good, then I ſhould fail in my concluſion;

I ſhall

I ſhall therefore ſet forth in few words, that all the Seſſes are void.

And the cauſe is this, That the draining of the ſuperfluous Waters in *S.* appeareth by my Caſe to be onely commodious for *S.* and that *D.* the other Town had no good thereby: And it appears alſo, that by the repairing of the ancient Sewer in *D.* that Town onely had benefit thereby, therefore to aſſeſs *S.* to repair in *D.* and *D.* to contribute to *S.* where in thoſe Caſes there could be no benefit, is directly againſt the letter and ſenſe of theſe Laws; but herein either of them ought to have been at charge with that, by the which it took benefit, and that not otherwiſe; and therefore the mixture marred all the matter: And ſo upon all this I conclude my Argument as I did my Caſe, that the new Bank, new River, and old Sewer were well decreed, but that the aſſeſs is void *in toto & in qualibet parte.*

Finis Secundæ Lecturæ.

Lectura

Lectura Tertia.

IN my two preceding Caſes, the main body of this great Law were contrived, and therefore I took a greater and larger compaſs in my Arguments therein, than otherwiſe I would have done; and I am now come to the execution of theſe Laws, wherein the life and livelihood of all Laws conſiſt: And it may well be ſaid of execution, as Mr. *Plowden* in *Zouch* and *Stowell*'s Caſe, in his *Commentaries*, *fol.* 358. ſaith of a fine, that it is *finis fructus exitus & effectus Legis*; ſo is execution the fruit, iſſue and end of the Law, and without it nothing is effectual, and till it come nothing is material; for to begin a Suit and ſtay at the declaration, were a fruitleſs enterpriſe; and to proceed on to judgment, and to go no farther, were like a Traveller which undertook a journey, and returns or ſits down without farther moving, before he came at the end of his intended progreſs. *Plow. Com.*

Law, as *Cicero* ſaith, is but *mutus Magiſtratus*, the Magiſtrate is *Lex loquens*; but I ſhall add ſomething, which upon the matter is the ſum of all things, that is, That *executio eſt Lex agens*: And becauſe I eſteem the time to be almoſt loſt or miſpent which is prologued out in preambles, I will therefore now briefly divide this part of this Statute into theſe inſuing heads: *Cicero.*

Either in puniſhing the body and perſon of the Delinquent with { Impriſonment, Fine, or Amerciament. } 1.

2. Or in doing execution upon the Offender's Goods { By diſtreſs, or by the Abſolute ſale thereof.

3. Or otherwiſe in extending upon the Real Eſtate, { By charging the Land in perpetuity, or temporarily; or by the abſolute ſale thereof.

The true and due execution of all theſe in a juſt, legal, equal and qualified decree, requireth of all other parts of Law this greateſt and trueſt diſcretion, conſideration, wiſedom and judgment of the Commiſſioners: And I take it, it may ſtand as a ground infallible, that there be as many degrees of puniſhment, as there be offences; It behooveth therefore the Commiſſioners to be circumſpect, that they apply to every offence his due puniſhment; for it is injuſtice to puniſh the offence committed in a wrong degree; to pronounce a Traitor's judgment upon a Felon, or a Felon's judgment upon a Traitor, is grand miſpriſion; to impriſon the Body, or to fine the perſon, where an Amerciament is onely due, is not onely injuſtice in the Commiſſioners, but thereby alſo their diſcretions are to be drawn in queſtion and cenſured.

And ſeeing the Statute doth ſo much lie upon diſcretion of the Commiſſioners, as in many parts of this Law it is mentioned; It ſeemeth the Parliament did give them to underſtand, That ſuch as were to meddle in thoſe affairs, ſhould be both diſcreet and wiſe, and ſhould ſtrive to become learned in thoſe affairs.

And therefore for the better furniſhing of them with the true underſtanding of the ſaid parts of this Statute, I have framed a Caſe thereupon, which doth give juſt occaſion to treat fully of them all.

The third Case.

A. Gave the Office of a Ranger of a Foreſt, to which a Manor is belonging to *J. S. & Abnepti*, and to the heirs, males and females, of their Bodies in Frank-marriage, and dieth, *B.* and *C.* their legitimate Son and Daughter, and *D.* their Baſtard Daughter enter, and dieth in ſeiſin, and *E.* her Daughter enters: The Commiſſioners of Sewers at a Court make a Law, That a Goat ſhall be repaired, and aſſeſs ſeverally *A. B. C.* and *E.* to doe it, upon ſurmiſe that they all had benefit: *B.* and *C.* refuſe to obey, for which *B.* is impriſoned, and *C.* is fined; *A.* and *E.* tender pleas of diſcharge, which are refuſed, and they are ſeverally amerced, and a Law made, that *A.* ſhould be diſtrained, and for non-payment the diſtreſs to be ſold, without allowance of Replevin, and the intereſt of *E.* ſhould be alſo ſold, becauſe ſhe hath nothing to be diſtrained by.

I conclude, the Commiſſioners of Sewers have done due Juſtice upon the Offenders in every part of this Law.

Argumentum Lectoris.

The paſſages of this Caſe are both at the Commonlaw and by this Statute: The Commonlaw is the means, but the Statute is the matter I muſt inſiſt upon: But ſeeing the Statute Law can receive no due conſtruction, but by the Rules of the Commonlaw, I have therefore made a harmonial compoſition of them both in my Caſe, and I do diſtinguiſh and branch out my Caſe into theſe enſuing points.

Points at the Commonlaw.

Imprimis, Whether this Office may be intailed or not? 1.

Secondly, Whether it be an ordinary Intail, or a Frank-marriage? 2.

Thirdly, Whether the Baſtard be inheritable to this Eſtate, or not? 3.

Points upon the Statute.

1. First, Whether the Commiſſioners have a Court, or onely the ſtrength of the Commiſſion without a Court?

2. Secondly, Whether Commiſſioners of Sewers have power to impriſon and to fine? if ſo, then whether they have well behaved themſelves in this Caſe, or not?

3. Thirdly, Whether this Law doth admit of any pleas, and eſpecially of pleas of diſcharge?

4. Fourthly, Whether the Law made touching the diſtreſs be well made, becauſe it ſeemeth *prima facie* to oppoſe a main point of the Commonlaw, in denying of Replevins?

5. Fifthly and laſtly, If the Law made for ſale of Lands or Tenements in Tail be warranted by this Statute, or not?

Theſe be the materials of this Caſe, wherein you may perceive by the beginning, what you are to expect in the ſequel and concluſion of my argument.

Theſe Points upon the Statute are of great conſequence and importance, and tend much into the powers of theſe Laws: In the handling whereof, according to my wonted faſhion, I intend to maintain the Affirmatives of my Caſe.

Firſt Point.

I did not intend it a point of any importance in my Caſe, Whether Land might belong to an Office; for that in the 1 *H.* 7. *fol.* 28. in Sir *Richard Croft*'s Caſe, it is reſolved it might: For there Land did belong to the Office of a Foreſter, and might belong to the Office of the Warden of the Fleet, and alſo to a Corody which was no Office, and theſe as well as to a ſpiritual Office, Parſon, Vicar, Prebend or ſuch like.

1 *H.* 7.

And yet it hath been held, that Land may be appendant to offices of Inheritance, but not to offices for life; for then the Freehold would upon the death of every Officer be in obeyance: *Dyer* 6. *E.* 6. 71. *Davis Rep. fol.* 34.

Dyer 6. *E.* 6. 71. *Davis Rep. fol.* 34.

But

But whether or no these Lands might be parted from the Office by alienation, I thought that an argumentable point: in 6 *H.* 8. *Dyer, f.* 2. *Empson*'s Case it is said, if the King create a Duke, and grant to him an annuity to maintain his Dignity, that annuity was so incident to his Dignity as it could not be sever'd therefrom; and so of Lands belonging to a Parson, Vicar, Bishop or such like, because they were given to the maintenance of them in their places, and therefore if these were severed, they might be recontinued again to their Successors. *6 H. 8. Dyer 2.*

And in the Case of Sir *Henry Nevil* in *Plo. Com.* an Office of a Parker was granted to two, and Annuity for the exercise of it; and it is there resolved, that the Annuity might not be severed from the Office: and so it might be said in my Case, That the Manor which belongs to the Office was at the first laid thereto, or given therewithal for the maintenance of the Officer in his place by the Founder, and so may not be severed therefrom without his consent. And touching the intailing of the Office of the Ranger of a Forest, it is held in *Mancel*'s Case in the Comment of Mr. *Plowden*, that the Office of a Bailiff or Receiver of the Rents of a Manor may be intailed. *Plo. Com.*

And so it was resolved by all the Judges of *England* in *Nevil*'s Case, *Co.* 7. 33. and that the office of Steward of a Manor might be likewise intailed within the Statute *de donis conditionalibus.* *Nevil's Case.*

So an use and a Copyhold, because these concerned and depended upon Land. But the Office of the Master of the Hawks, or the Master-ship of the Horse could not be given in Tail within the Statute of *West.* 2. *de donis conditionalibus*, nor an Annuity which chargeth the person; Yet all these may be given or granted within these intailed limitations, but yet they are no intails within that Statute.

I am

I am of Opinion, That the Office of a Ranger of a Foreſt cannot of it ſelf be given in Tail, but having a Manor belonging to it, makes the queſtion of more moment; For as the Office *De ſe* is not intailable, ſo the Land *per ſe* may be intailed: But Land in our caſe is not the principal, but the acceſſory & *acceſſorium ſequitur ſuum principale*; and therefore ſeeing the Land follows the Office, as the ſhadow doth the Body, and paſſeth out of his own kind by the ceremony belonging to the Office, and not by the ceremony by which Land is transferred and paſſed, I ſhould therefore take it, that the Eſtate of the Land ſhould be ſuch as the Office of it ſelf might bear, which could not be intailed; yet becauſe in the ſaid Caſe of the Foreſter, with Land belonging to it, it is taken to be in Tail in 1 *H.* 7. aforeſaid, with a remainder thereof over in Fee, I am therefore concluded to make any farther Queſtion of it, and ſo I leave it as I found it, and do paſs to the argument of the other Points.

1 *H.* 7.

Second Point.

The ſecond Commonlaw Point is, Whether this gift in my Caſe be a Frank-marriage or another intail; I have obſerved in Books that there be five things incident to a gift in Frank-marriage (*viz.*)

1. Firſt, It muſt be to or with a Coſin within the four degrees.
2. Secondly, The Word *Frank-marriage* muſt be literally expreſſed.
3. Thirdly, The Reverſion muſt be left at the time of the gift in the Donor; and then there be two other things follow as conſequents.
4. Fourthly, Acquital of payment of Rents and Services; But the Tenant in Frank-marriage ſhall doe fealty, according to *Littleton*.
5. And Fifthly, Warranty to ſecure the Eſtate.

And the want of theſe or any of theſe in the creation doth deſtroy that Eſtate in the conception.

Here

Here seem to be two Impediments in my Case to hinder this gift to take root as a Frank-marriage; It is made *abnepti*, which is the Cosin in the fourth degree, and the last in those gifts, whereby the gift that way cannot have his full operation, for that the first Heir of their Bodies is out of the former Privileges: But in regard I take it that a Frank-marriage doth more respect his original creation *In incepto* than the descent of the privileges to the Heirs *In suo progressu*, I take this to be no impediment to hinder this from being a gift in Frank-marriage. But here the words in the gift preceding the word *Frank-marriage* do differ much from it, for by the special limitation the Heirs Females shall inherit with the Heirs Males, *Simul & Semel* as Heirs in common; But in the Case of the Frank-marriage Heirs Males shall first inherit single, and for want of them then the Females.

I do agree the Law, that in cases where the special words of limitation may in construction be made to agree with the word, and limitation of Art contained in Frank-marriage, the gift shall be taken a Frank-marriage, as in the Case of 2 *H.* 3. *It. Suff. Fitz. Mordanc. plac.* 52. where Lands were gi- 2 *H.* 3. ven in Frank-marriage to *R. S. cum Alicia sorore le donor ita quod post mortem dictæ Aliciæ & puerorum suorum*, the Land should revert to the donor; and this was adjudged a gift in Frank-marriage, and the words *Ita quod* were holden of no validity; neither will the words of *Reservandum Reddendum Tenendum* or *Warrantizandum*; though they vary from the nature of a Frank-marriage, yet they shall not destroy the same as an *Habendum* may do, which is the word whose proper place is to create the Estate: and therefore if any thing come therein, which is repugnant thereunto, the same will alter the quality of the gift: And with this agreeth the Case in 45 *Ed.* 3. Title *Tail* 14. and 31. where Lands were 45 *Ed.* 3. given to *J. S.* in Frank-marriage with *B.* the Daughter of the Donor, *Habendum* to them and their Heirs, and this was held a Fee simple, and no Frank-marriage; so in *Webbe* and *Owen* 26. *Potter's* Case, *Owen* 26.

And

And the like Law is where Lands are granted in Frank-marriage, the remainder in Fee to *J. S.* and his Heirs; the Frank-
Godb. 20. marriage is defeated by the opinion in *Br.* Caſes, and *Godb.* 20. And if Lands be given in Frank-marriage, the remainder to the Heirs of the Husband, by this remainder the Frank-marriage is defeated,
Moor 643. *Moor* 643. *caſe* 888. And ſo in my Caſe, becauſe there can be no reconciliation between the ſpecial words of limitation in my Caſe, and the Word Frank-marriage: I am therefore of Opinion, that this Gift is an Eſtate in Tail, according to the ſpecial limitation, and no Frank-marriage.

Note, The Caſes here put, are of a remainder in feeſimple; For if Lands be given in Frank-marriage, the remainder to the Donees, or to a Stranger in tail, the gift in Frank-marriage ſtands good, notwithſtanding this remainder, becauſe the Donor hath ſtill the reverſion in fee in himſelf, and the Donees in Frank-marriage
1 *Inſt.* 21. *Godb.* 20. hold of the Donor, *Co.* 1 *Inſt.* 21. *b. Godbolt* 20. *Webbe* and *Potter*'s Caſe.

Third Point.

Whether the Baſtard ſhall inherit to have an Eſtate in tail, is the third Common-law queſtion; for I am clear of opinion, that a Baſtard cannot inherit to a gift in Frank-marriage, becauſe Adultery and Fornication, which is the Seed of every Baſtard, is oppoſite to marriage, and in breach of that powerfull link and knot of Matrimony, which is an Ordinance derived from the Divine Power of the Almighty: And therefore ſeeing marriage is the material conſideration of ſuch a gift, Baſtardy the oppoſite can never (being out of the conſideration) come within the privileges to inherit this Eſtate.

So

So if I give Lands to *J.* and *S.* and to the Heirs of their two Bodies lawfully begotten, their Baſtard cannot inherit to this gift, becauſe he is not heir of their two Bodies lawfully begotten; But if the Word *Lawfully* had been out of the limitation, then I ſee no reaſon but that a Baſtard may inherit to an Eſtate in tail, as to a Fee-ſimple conditional, which he might have done at the Common-law, ſeeing an Eſtate tail may be made before marriage, as expecting to be confirmed thereby; and ſo a Baſtard born before marriage is by the conſummation of a ſucceeding marriage made capable to inherit to them, if his poſſeſſion continue without diſturbance to his death: Yet in *Plow. Com. fol.* 57. in *Winbiſh* and *Tailboy's* Caſe, it is ſaid, *That if there be a Baſtard, Eigne and Mulier puiſne, and the Baſtard after the death of the Anceſtour entreth into intailed Lands, and dieth ſeized, this doth not bind the Mulier in caſe of Eſtates Tail, as it doth in an Eſtate of Fee-ſimple:* and voucheth for authority in the point, 39 *Ed.* 3. *plac. ultimo*, where the Caſe is, *That Lands were given in tail to* J. S. *the remainder in tail to* C. *and* J. S. *hath Iſſue by a Woman a Baſtard, and dieth ſeiſed, and then the Baſtard dieth ſeized, having Iſſue, he in the remainder may recover the Land againſt the Iſſue of the Baſtard*; affirming, *That the continuance of poſſeſſion in the Baſtard ſhall not be prejudicial to him in remainder:* To which opinion I do ſubſcribe, becauſe he in remainder is a ſtranger in bloud, and ſo cannot be concluded as the *Mulier* ſhall be; for a *Mulier* indeed is like a graft drawn out of both the blouds of Father and Mother: ſo the Baſtard is a ſlip which is derived from the ſame Stock, and had his being therefrom. *Plo. Com.* 57. 39 *Ed.* 3.

And for my own opinion, conſidering the Statute of *Weſtminſter* 2. *de Donis* doth accept of Gifts in tail made before Marriage, upon the hope and expectation of a ſucceeding Marriage to perfect the ſame, even ſo the Marriage ſucceeding to a Baſtard's birth gives him and his Iſſue a privilege in theſe Caſes of deſcent, which is denied to other Baſtards or mere Strangers. And I ſee no reaſon where-

fore that maxime and principle of Law ſhould be altered by the ſaid Statute of *Weſt.* 2. but becauſe *Mountague*'s opinion in Mr. *Plow. Com.* ſways the other way; I will therefore ſubmit this Point to men of greater judgment than my own: So that if the Law fall out for the Baſtard Iſſue, then ſhe ſhould have title to the half part belonging to the Females, and to no part belonging to the Heirs-males: And with this Concluſion I do here end my Common-law Points, and will now reſort to the handling of my Statute Points.

In the Caſe of *Blodwell verſus Edwards, Mich.* 38 & 39 *Eliz. B. R. Popham* Chief Juſtice, and other of the Judges were of opinion, that if a limitation be to ſuch iſſue of the Body of a Woman, as ſhall be reputed to be begotten by *A.* on her Body, and ſhe hath afterwards a Baſtard, who is reputed to be their Iſſue: The Baſtard can never take by ſuch a limitation: For the Law hath not any expectancy that any ſuch Perſon ſhould be, nor will give liberty or ſcope, to provide for ſuch before they be; And if he cannot take at the time of his birth, he never afterwards ſhall take; Now the Baſtard was not capable to take at the time of his birth, becauſe he could not then be reputed to be the Son of *A.* For none can gain ſuch a reputation at the inſtant time of his birth, but it muſt be gained by continuance of time, and reputation of the Countrey. The limitation alſo to one and the Iſſue of his Body, is always to be intended lawfull Iſſue; and the Law will never regard any other Iſſue, *Cro. Eliz.* 510.

Which

Which opinion directly contradicts that of our Reader, *viz.* That if Lands be given to *J.* and *S.* and to the Heirs of their two Bodies begotten, without the word (lawfully) a Baſtard may take by ſuch a limitation: And the caſe ſeems to be ſtronger againſt him, becauſe he puts in the word, Heirs. For though a Baſtard may be the Iſſue of their two Bodies, yet he cannot be the Heir of their two Bodies: Nor can the marriage of *J.* and *S.* ſubſequent to the birth of the Baſtard alter the caſe, if that in *Croke* be Law; For although what our Reader ſaith is true, that the Statute of *W.* 2. *de donis* doth accept of gifts in tail, made before marriage, upon the hope and expectation of a ſucceeding marriage to perfect the ſame, yet a Baſtard cannot perfect ſuch a gift in tail in the eye of the Law, which onely regards lawfull Iſſue.

The Sewers are a Court of Juſtice.

I Am deſirous to attribute to this Law all the honour and dignity which may in any ſort belong to it; and therefore I am unwilling to forget any thing which may materially tend to the upholding and maintaining thereof: wherein amongſt the reſt, and the chiefeſt of them all, it is, To prove the Commiſſioners of Sewers a Court of Juſtice: I know ſome Opinion hath been to the contrary, and held, That the Commiſſioners had onely the power of a Commiſſion, and not any Court; and I ſuppoſe much may be ſaid to maintain that Opinion,

1. First, Becauſe *in expreſſis terminis* there is no Court ordained by this Statute, or by any other, and without words expreſs in the Point, they can have no Court.

2. Secondly, By preſidents in the like caſe it hath been held no Court, as in the Caſe of the City of *London*, in Sir *Edward Cook*'s 8th Report, The King granted to the Major and Commonalty *Plenum & integrum ſcrutinium gubernationem & correctionem omnium & ſingularum miſteriarum*, and it was reſolved, That they had no Court in this caſe, becauſe no Court was granted to them by the Patent, as it is holden in Doctour *Bonham*'s Caſe, *f.* 119. in the ſame Report, wherein the principal Caſe there put ſways the ſame way; for there the Phyſicians had power to impriſon, and to fine Offenders, yet they had not any Court thereby.

The Caſe of the City of *London.*

And ſo if a Commiſſion iſſue out of the Chancery to examine matters in a Suit there depending, and to *Oyer* and *Terminer* the ſame, yet hereby theſe Commiſſioners have not any Court; for in that caſe the Commiſſion is derived out of the proper power of the Chancery, which is the Court for that cauſe *eo inſtante* when it is in Commiſſion: And one Cauſe cannot *uno eodemque tempore* depend in ſeveral Courts; neither have the Commiſſioners upon the Statutes of Bankrupts and charitable uſes any Courts: nor the Commiſſioners in the caſe of 1 & 2 *Eliz. Dyer, fol.* 175. which had power to hear and determine the Office of the *Exigenter*, had not any Court, but onely the power of a Commiſſion: For in truth theſe are all of them rather Miniſterial than Judicial Commiſſions, and ſo a Court is not proper to them.

Yet I am of opinion, That the Commiſſioners of Sewers have an eminent Court of Record: It is true, that Courts had their beginnings in three ſorts;

1. Firſt, By Preſcription.
2. Secondly, By Charter-grant from the Crown. And,
3. Thirdly, By Act of Parliament.

1. The Courts, Hundred and Leet began by cuſtome, and ſo did the eminent Courts of *Weſtminſter-hall.*

2. Courts.

2. Courts in Corporations moſt of them took their beginnings by Charters. And,

3. The Courts of firſt Fruits and Tenths, and the Court of Wards and Liveries were erected by Act of Parliament, the one in 32, the other in 33 *H.* 8. But to bring the queſtion nearer home to our Statute of Sewers, which is but *additamentum legibus antiquis Sewerarum*, for they have been uſed from the beginning of Laws, though perhaps not known by that name: And yet before the 6 *Hen.* 6. they were known by that name, as by the peruſal of that Statute may be collected: And therefore for the cauſes and reaſons hereafter enſuing, I hold the ſame to be a Court. 32 *H.* 8. 33 *H.* 8.

Firſt, For that the Statute of 12 *Ed.* 4. *cap.* 7. and our very Statute of 23 *H.* 8. calls the Commiſſioners of Sewers *Juſtices*, *So Fitz. N. B.* 113. *b.* and one cannot properly be a Juſtice or a Judge but in a Court, and that in *Fitzherbert* was urged by *Brampſton*, Chief Juſtice *B. R. Paſch.* 18 *Car.* 1. in the Caſe of *Commins* and *Maſſam*, to prove they were a Court before the Statute of 23 *H.* 8. 5. *March* 201. 1. 1 H. 4. c. 12. 12 *Ed.* 4. *March* 201.

Secondly, Here be legal Proceedings and Proceſs: for this Statute ſaith, *That the Commiſſioners may make and direct all Writs, Preceps, Warrants, and other Commandments, to all Sheriffs, Bailiffs, and other Miniſters, &c.* And the Statute of 1 *H.* 4. *cap.* 12. hath theſe words in it (*That he that thinks himſelf grieved may purſue and he ſhall have right*) and where there be legal proceedings, and where parties grieved may come in and have remedies for the wrongs and injuries done to them, there is properly a Court of Juſtice to have them in: But in Dr. *Bonhams* Caſe the Phyſicians had no legal proceedings, and therefore parties grieved could have no remedy, which was the reaſon they had not a Court. 2. 1 *H.* 4.

3. And Thirdly, The chief reaſon wherefore I take it that Commiſſioners of Sewers have a Court, is, Becauſe the Commiſſion of Sewers is a member of the ancient and renowned Court of *Oyer* and *Terminer*, which was and is a Court of great eſteem, power and authority; and ſo it was needleſs to erect a new Court in this caſe, as it was needfull to erect and found the Courts of Wards and firſt Fruits, the firſt would elſe have remained in the Chancery, to the which primarily it did belong, and the other was a new Revenue, and wanted a Court to direct or diſpoſe of it.

4. Fourthly, The Commiſſioners have a Clerk proper to themſelves to regiſter their Laws.

5. Fifthly, The Commiſſioners have power to make Orders and Decrees, which are Judgments in effect, and ſome of them cannot be reverſed but by Act of Parliament.

6. And Laſtly, Writs of Error have been brought to reverſe Judgments given in that Court.

For all which cauſes I do conclude, That the Commiſſioners of Sewers have a Court of Record, although it be not holden *in aliquo loco certo:* So was the *King's Bench*, a Court of more Eminency than this, but *ubicunque fuerimus in Angliæ*, and for expreſs Authority in the point is *Gregory*'s Caſe in the 6th *Report* of *Cook*, Chief Juſtice, that the Sewers is a Court of Record.

Gregory's Caſe.

Herne. And this Court (by the opinion of *Herne*, *Lect. p.* 7, 8.) may ſit and inquire by a Jury on the Sunday, though the ſame be not in Law *dies juridicus*; For judicial Acts *propter neceſſitatem* are good on that day; And the Sea is an Enemy not to be repelled but by this Court.

Note, All Commiſſions of Sewers, and all returns and proceedings thereupon are by the Statute of 23 *H.* 8. 5. to be in Engliſh, and not in

in Latin: And ſuch ſtrictneſs is not obſerved in the forms of ſuch proceedings, as in Indictments, *Siderfin* 1. 78. *Style* 85. *Siderf.* 1. 78. *Style* 85.

Neither doth there need any adjournment of the Commiſſion of Sewers, as was agreed, *Mich.* 1649. by the Court of upper Bench (then ſo called) in the Caſe of the Inhabitants of *Outwell, &c. Style* 179. *Style* 179.

And although before the ſaid Statute, when the Proceedings of the Commiſſioners of Sewers were in Latin, a Writ of Error would lie thereupon: yet no Writ of Error now lieth upon any of their Proceedings, becauſe they are all in Engliſh: *March* 197, 201. *Commins verſus Maſſam*: But in that Caſe *Brampſton* then Chief Juſtice *B. R.* ſaid the Party grieved ſhould be at no loſs thereby; for he ſhall be permitted to diſcharge himſelf by Plea, as in all Caſes the Party ſhall be, where he can neither have a Writ of Error or *Audita querela*, as in 11 *H.* 7. 10. *Ib.* 201. And a *Certiorari* likewiſe ſtill lies, to remove ſuch Proceedings into the *King's Bench*: See for this *poſtea, pag.* *in Certiorari.* *March* 197, 201. 11 *H.* 7. *fol.* 10.

Impriſonment impoſed by the Commiſſioners of Sewers.

IT is a point of high conſequence, whether Commiſſioners of Sewers have power by theſe Laws to impriſon the Body of a man for any thing touching the ſame, for that impriſonment of the Body ſeemeth to ſway ſomewhat againſt the

the grand Charter of *England*, and againſt the liberty of a free-born Subject; and it is ſaid in *Bonham*'s caſe, 28 *H.* 8. *in Dyer*, that liberty is a thing which the Law much favoreth: and I find in our Books of Law, That the Judges have been very carefull and curious in not extending words contained in Charters to the impriſonment of mens Bodies, unleſs they were expreſs in the Point: And therefore in *Clark*'s caſe in Sir *Edward Cook*'s 5th *Report*, *fol.* 64. The caſe is, That the Term was to be kept at Saint *Albans*, and the Major there and his brethren did aſſeſs every Townſman towards erecting and building of the Courts of Juſtice, and made an Order, That he which ſhould refuſe to aſſiſt and pay ſhould be impriſoned; and one being arreſted and impriſoned, brought his Action of falſe impriſonment againſt the Major, who pleaded in effect, That they were incorporate by King *Ed.* 6. and had power granted to them in their Charters to make Ordinances, by reaſon whereof they made the ſaid Order, and ſo juſtified, the impriſonment: But it was adjudged againſt the Major, for that by the ſaid Charter they had not any power to make an Ordinance to impriſon a man's Body, for that were againſt the grand Charter in *Magna Charta*, *cap.* 29. *Quod nullus liber homo impriſonetur niſi per legem terræ:* But by that Book they might have inflicted a penalty, and diſtrained, or brought an Action of Debt for it. In Doctor *Bonham*'s caſe in the 8th *Report*, King *H.* 8. incorporated the Phyſicians of *London*, and gave them power by Charter to examine the Imperites, and to find out the defects, *Et pro delictis ſuis in non bene exequendo faciendo & utendo illos per punitionem eorum delinquentium per fines amerciamentum & impriſonamentum corporum ſuorum:* hereby it appears, that by the King's Letters Patents they had power to impriſon the Body; but I find their Charters comfirmed by Act of Parliament: Yet in 2 *Eliz.* *Dyer fol.* 175. the caſe is, *That the Queen did award a Commiſſion directed to certain Commiſſioners, to Hear and Determine the controverſies betwixt* Scrogs *and* Colſhil *touching the Office of the* Exigenter, *and that if* Scrogs *ſhould refuſe to*

23 *H.* 8. *Dyer.*

Clark's Caſe.

Mayor of St. *Albans.*

Magn. Chart.

Dr. *Bonham*'s Caſe.

2 *Eliz. Dyer* 175.

to obey to make answer before them, they should commit him to Prison; but the validity of this last Commission I much doubt of. I am of Opinion, That the Commissioners of Bankrupts and charitable uses, have no power to commit any man; but if any abuse or misdemeanor be committed in contempt or derogation of their Authorities, they may make Certificate thereof into the Chancery, and refer the punishment thereof to the will and discretion of the Lord Chancelor or Lord Keeper for the time being.

In *Godfrey*'s Case in the 11th *Report and Roll* 1.73,*&c.* there is a Discourse what Courts have power to imprison, and which not, and there it is said, Some Courts may Fine, but not imprison, as the Courts Leet and Sheriff's turn; some others could neither fine nor imprison, as Courts Baron and County Courts; and some could neither fine, imprison nor amerce, as Eccleſiastical Courts; And some may imprison and not fine, as chief Constables at their Petty Sessions for an affray done in disturbance of them; And other Courts there were which might fine, imprison and amerce, as the eminent Courts of *Westminster*. *Godfrey's Case.*

So that imprisonment is not incident to every Court, nor to every offence; Yet I am of Opinion that the Commissioners of Sewers may imprison the Body, for it is not onely a Court of Record, but is authorized by Act of Parliament; and I suppose that there be words in the Commission and Statute which will bear this construction, which are as follow, *viz. And all such as ye shall find negligent, gainsaying or rebelling in the works, reparation or reformation of the premises, or negligent in the due execution of the Commission, That ye compell them by distress, fines and amerciaments, and by other Punishments, ways or means, &c.* Which words are strong, and large enough to authorize the Commissioners of Sewers upon just cause to imprison the Body; But here they are to be carefull, and not to think that they may imprison, fine or amerce in any case, because the words be generally put together: But this construction must be thereof made, That they may imprison where imprisonment is

due, and fine in caſes fineable, and amerce in caſes amerceable, and diſtrain where a diſtreſs properly lieth by the Rules of Law; and they may not impriſon, where by the Laws impriſonment is not due, but every one of the ſaid puniſhments is to be uſed in its proper kind; for theſe words promiſcuouſly put together, muſt be ordered by a juſt and legal conſtruction, according to the Rules of Law and Reaſon.

And I have known the words of a Statute generally and promiſcuouſly put together, have been marſhalled according to their diſtributive operations, as the Statute of
1 R. 3. 1 *Ri.* 3. which is, *That all Feoffments, Gifts, Grants, Releaſes and Confirmations of Land made by* Ceſtuy que uſe *ſhould be good*; Yet though theſe words were generally put together, notwithſtanding the wiſe and diſcreet Sages and Expoſitors of our Laws have ſo Marſhalled the words of this Statute, that they made conſtruction thereof according to the Rules and Reaſons of the Law, That this, That *Ceſtuy que uſe* in Poſſeſſion might make a Feoffment; and that *Ceſtuy que uſe* in Reverſion or Remainder might grant the Land, and *Ceſtuy que uſe* of a diſcontinued Eſtate might releaſe or confirm: and yet the words of this Statute were general, howſoever Reaſon muſt be the Expoſitor, that every thing be done in due form of Law, and not in prepoſterous manner.

And theſe matters being thus paſſed over, I ſhall endeavour my ſelf to declare in what Caſes Commiſſioners of Sewers may impriſon, fine and amerce, and where not.

Impriſonment, fine and amerciament.

Fines.

IF one give evil language to Commiſſioners in Court, or diſturb the peace there, or hinder the buſineſs of the Court in a Turbulent faſhion, he may be by them Fined or com-

committed to Priſon, or both, at the diſcretion of the Commiſſioners; for by 34 *H. 6. fol.* 24. in every caſe when a man is fined, he may be impriſoned; and by 19 *Hen.* 6. *fol.* 67. in every caſe where one is impriſoned he may be fined; and our Law in expreſs words gives the Commiſſioners power to ſet fines: and then by the opinion of the ſaid Books *ex conſequenti* they may impriſon. 34 *H.* 6. 19 *H.* 6. not ſo.

But in all Caſes where the Commiſſioners of Sewers impoſe a fine upon a Man, the ſame ought to be reaſonable; and if it be exceſſive, a *Certiorari* may be granted by the Court of *King's Bench*, and the Judges there may moderate the fine: By *Brampſton*, Chief Juſtice, *B. R.* 18 *Car.* 1. *March* 202.

If one oppoſe againſt a Law of Sewers not legally in queſtioning the ſame, but refractary contemning thereof, or by diſſwading perſons aſſeſſed not to pay ſuch, or not to obey the Law, I am of opinion that a perſon is both fineable and impriſonable; and if this be done *in facie Curiæ*, it aggravates the contempt; and this is the Rebelling which this Statute ſpeaketh of.

If one do refuſe to obey the Decree, Rule or Order of the Court, eſpecially if it be done in affront of the Commiſſioners, when they be in execution of their Commiſſion, This is a contempt, and he is to be impriſoned for ſuch his diſobedience, and this agreeth with 37 *Hen.* 6. *fol.* 14. 37 *H.* 6.

There is no queſtion but a man may be fined by the Court of Sewers for not obeying their Decree, Rule or Order: See *Bruſter's* Caſe, *Style* 445. where one was fined by them for not obeying their Orders, after a *Certiorari* was delivered to them to remove the Orders, made againſt the Party. But it being ſhewed to the Court of *Style* 445.

King's Bench that the fine ſet was for diſobeying a new Order of theirs made againſt the Party, after the *Certiorari* was returned, and not for diſobeying the Orders removed by the *Certiorari*, and ſo no contempt to the Court: An Attachment againſt the Commiſſioners of Sewers was decreed; and *Roll* ſaid, that they might proceed upon the Commiſſion of Sewers, notwithſtanding the *Certiorari*, for the *Certiorari* doth not remove the Commiſſion.

But for a bare diſobedience to their Orders, it ſeems they cannot impriſon. For in the Caſe of the Inhabitants of *Oldberry verſus Stafford*, *Trin.* 15 *Car.* 2. where the Commiſſioners of Sewers had made an Order for a Miller to repair the Floudgates, and if he broke the ſaid Order, or refuſed to obſerve it, that then he ſhould be impriſoned, it was reſolved by the Court of *King's Bench*, that the Order was illegal. For although the Commiſſioners of Sewers being a Court of Record, may impriſon a man for a contempt committed towards them, yet that ſhall be intended onely of a contempt committed in their preſence, and not barely in diſobeying their Order, *Siderfin* 1. 145.

Siderf. 1. 145.

In *Termino Paſche* 12 *Jac.* in the King's Bench, the caſe there was in debate between *Hetley* and *Carier*, where certain Commiſſioners of Sewers in the Counties of *Huntington* and *Northampton* made a Law, That certain Townſhips in thoſe Counties were aſſeſſed to a work of Sewers, and one

In. *Jac.*

Town

Town was rated to five pounds; and becauſe the ſame was not paid, the Commiſſioners cauſed a Warrant to be directed to the ſaid *Carier*, to diſtrain for it, and he diſtrained the Cattle of *Hetley* one of the Inhabitants, and *Hetley* brought an Action of Treſpaſs in the Kings Bench againſt *Carier* and arreſted him thereupon, and upon complaint made to Sir *Anthony Mildmay*, and Sir *John Boyer* Knights, and other the Commiſſioners of Sewers, they cauſed *Hetley* to be attached by their Warrant, and committed him till he ſhould releaſe his Action brought againſt *Carier*, and untill he ſhould be delivered out of the Priſon by Warrant to be granted by them: But afterwards *Hetley* procured a *Habeas corpus cum cauſa* out of the Kings Bench, and was removed, where all the ſaid matter appeared; and thereupon Attachments were awarded againſt the ſaid Commiſſioners; and Sir *John Boyer* appearing, was by *Cook* chief Juſtice, *Crook*, *Dodderidg* and *Houghton*, Juſtices, committed to the King's Bench Priſon, and was fined two hundred pounds; but was after delivered *Ex favore regis ſed non ex Rigore Legis*.

And Sir *Anthony Mildmay* not appearing in the *King's Bench* upon warning given him, an Indictment of *Præmunire* upon the Statute of 27 *E.* 3. *cap.* 1. was exhibited againſt him for this offence, and he had judgment (as it ſeems) thereupon; But he afterwards obtained the King's pardon, which was allowed in Court: See the Caſe at large in *Bulſtrode* 2. 197, 198, 199, 299, 300. and *Cro. Hil.* 11 *Jac.* 336.

27 *E.* 3. 1.

Bulſtrode 2. 197, *&c.* *Cro. Jac.* 336.

And in my opinion, The ſaid Commiſſioners in this caſe in making a Warrant to attach *Hetley*, and in impriſoning of him for the ſaid cauſes did exceedingly err, and the rather, becauſe they took upon them to overrule the Juſtices of the King's Bench, being of a higher and greater authority

authority than they were of; But this is no preſident to impeach the power of the Commiſſioners of Sewers for committing perſons offending their authorities to Priſon, if their proceedings therein be conſonant to the Laws of this Realm; but they were puniſhed in this caſe, not for executing their power, but for exceeding their limits, and the bounds of their Commiſſion.

If a Collector, or Expenditor, or other Officers of Sewers have been negligent in the execution of his Office and place, he is fineable therefore, though his offence be but neglect, becauſe he was an Officer, and was alſo ſworn to execute the ſame duly.

But I take it, a neglect in another ordinary perſon is not to be puniſhed.

And if one be rated to pay towards repairs, and he neglect to pay the ſame at the days and times appointed, he is not fineable therefore, but is to be amerced in this Caſe.

If a Collector or Officer of Sewers do diſtrain a man, or doe any other Act contrary to an Inhibition of Sewers to him directed by the Commiſſioners of Sewers, he may
7 *H.* 4. be fined and impriſoned *& ſimile factum fuit* in 7 *Hen.* 4. *fol.* 33.

If a Purpreſture be committed in the King's ſtreams, as in fixing Piles and Stakes therein, or in ſtopping, ſtraitning or diverting the courſe of the Waters from their ancient chanels or courſes, theſe offences being preſented, the offenders are finable therefore, if in the Preſentment they be found to be done *vi & armis*, or be preſented by the name
19 *H.* 6. of Purpreſtures; for by 19 *H.* 6. *fol.* 8. if the offence be done with force, and ſo preſented, then the Offender is fineable, but otherwiſe it is if the offence be not found, but omitted, for then an amerciament is onely due. And
7 *Eliz. f.* 240. it is ſaid in *Dyer* 7 *Eliz. fol.* 240. *That for a Purpreſture one is fineable*, and a Purpreſture may be committed in *aquis Regiis* as well as in *viis Regiis*, by the opinion of *Glanvil*:
Keleway 141. And in *Keleway's Report*, *fol.* 141.

And

And a Purpreſture is taken to be an offence done to the King immediately, or to his Poſſeſſions; But if the like offence be done to a Subject or to his Lands, it is termed a *Nuſans*. Purpreſture. *Nuſans.*

The Abbat of *Mellefont* was fined for erecting a Were in the Royal River of *Boyne* in *Ireland*, which is expreſſed in the *Iriſh Reports* in the Caſe of the Royal Piſcary of the Ban in *Ireland*, and this was a Purpreſture.

If one do refuſe to accept an Office of Sewers, being thereto duly elected by the Commiſſioners, he is fineable therefore, for in *Greſly's* Caſe, 8th *Report*, One being elected and choſen Conſtable, did refuſe to take the Office, and he was fined. *Greſly's* Caſe.

And if an Officer do miſdemean himſelf in his Office, he is fineable, for in 10 *H. 6. fol. 6.* A Tythingman did refuſe to make preſentment, being thereto required, and he was fined therefore. So in caſe of the Sewers, if one of the Jury, or which is a Surveyor, refuſe to make preſentment when he is required by the Commiſſioners, he is to be fined. So if a Juror depart after he is ſworn on the Jury, or before he be ſworn, after his appearance be recorded, he is to be fined; And if an Expenditor or Collector, Officers of Sewers, be required by the Court to accompt for the moneys received and laid out by them, and they refuſe, they may be puniſhed by fines. 10 *H. 6.*

And if the Sheriff upon Writ or Warrant directed to him to return a Jury before the Commiſſioners, make no return thereof, nor doth not attend when he is required, he is to be fined by the Commiſſioners.

Alſo an Officer of this Court is fineable for falſities done by him in his Office, for theſe are a violation of his Oath, and is a breach of that truſt which the Court repoſed in him at his election and entrance into his Office, and therefore the offence is greater in him than in another man.

I have learned in Books that a Fine hath theſe qualities with it:

First,

1. First, The Party in that caſe is impriſonable.
2. Secondly, The cauſe for which it is impoſed is not traverſable, being merely the Act of the Court; but if it be impoſed upon a preſentment found by Jury, then the cauſe is traverſable.
3. Thirdly, All fines ought to be aſſeſſed, abated or increaſed in *Plena curia*, and not elſewhere.
4. Fourthly, Every fine ought to be reaſonable.

34 *Ed.* 3. And therefore I ſhall put the Commiſſioners of Sewers in mind as the Statute of 34 *Ed.* 3. *cap.* 1. did the Juſtices of Peace, that thoſe fines that they ſhould impoſe for any offence coming before them ſhould be reaſonable, having reſpect to the quantity and quality of the offence, for *Exceſſus in re qualibet jure reprobatur communi.*

But becauſe in *Godfry*'s Caſe it is ſaid, that *Commitment of the Body to priſon is incident to a fine, as by a* Capias pro fine *alſo may be collected*; Yet I hold it queſtionable, whether the fine ſhall precede the commitment, or the commitment the fine. But for my own opinion, I hold that this lieth much in the diſcretion of the Juſtices, and I find caſes and preſidents both ways; for in 41 *Aſſiz. plac.* 12. an Officer was impriſoned *quouſque finem fecerit*, where the impriſonment preceded the fine: and with this agreeth 7 *H.* 6. *fol.* 25. and in 33 *H.* 6. *fol.* 21. one was fined, and after impriſoned for it, and there the fine did precede the impriſonment.

41 *Aſſiz. pl.* 12.
7 *H.* 6.
33 *H.* 6.

But upon all theſe I take the Law to be, that if one be fined, and this fine may be levied by the Juſtices, as Juſtices of the Peace may doe (but not Juſtices of Sewers) there the impriſonment may be *quouſque finem fecit*, becauſe the fine is leviable by them: But the Law is not ſo of Commiſſioners of Sewers, becauſe they have no power to levy but to extreat the fines into the King's Exchequer. Howſoever one before them may be both impriſoned and fined *Diverſis tamen reſpectibus*, The one for the wrong done, the other for the contempt or diſobedience to the Court; As for example, if one refuſe to be a Collectour, he is fineable to the King, becauſe hereby the Commonweal is without

out an Officer; and he may alſo be impriſoned for diſobeying the Juſtice's command; and yet in my opinion it lieth much, if not altogether in the diſcretion of the Commiſſioners to impoſe or inflict both the ſaid puniſhments, or one of them, at their pleaſures, being not therein preciſely limited by this Statute.

Amerciaments.

AMerciaments be not ſo grievous as Fines be, for they be derived of the word *Miſericordia*, which ſignifieth moderation and mercy; and to that end was the Writ in the Regiſter *moderata miſericordia* deviſed, where one is outragiouſly amerced he might be relieved by ſuing forth that Writ, which Writ and the Law in that caſe is grounded upon the grand Charter, *cap.* 14. *Quod nullus liber homo amercietur niſi ſecundum quantitatem delicti:* And that none of the ſaid amerciaments be impoſed *ſed per Juramentum legalium hominum de viceneto.* *Magna Chart.*

Glanvil in his Book ſaith, *Eſt autem miſericordia Domini Regis qua quis per Juramentum legalium hominum de viceneto eatenus amerciand' eſt:* And *Fleta*, *lib.* 1. *cap.* 48. ſaith, *Quod liber homo non amercietur niſi per ſacramentum pariũ ſuorum.* And with theſe agreeth *Bracton*, *lib.* 3. *cap.* 1. and *Fitz. Nat. Bre. fol.* 76. and if the Steward ſet an amerciament upon a man on his own head it is void. *Glanvil.* *Fleta.* *Bracton.* *Fitz. N. B.*

By which authorities it plainly appeareth, that amerciaments are to be impoſed by a Jury, or by the Oaths of good and lawfull men; and therefore I have heretofore much marvelled, when ſometimes I have ſeen Juſtices of Sewers take upon them to ſet down amerciaments, without aſſiſtance of the Jury, which act of theirs was directly againſt the ſaid great Charter of *England*, and contrary to the ſaid authorities of Law.

So that there is a difference between the impoſing of fines which are done by the Juſtices, and amerciaments which be by Jury, or otherwiſe, *per ſacramentum pariũ:*

So is there great diverſity between the offences of the one kind, and the other; For if one do ſuffer a Wall, Bank, or other work of Sewers to fall into decay for want of repairing, which he was bound to maintain by Frontage, Tenure, Cuſtome or Covenant, he is in this caſe to be amerced therefore: And ſo if one be bound by any of the ſaid ties to repair a Bridge, Calcey, Goat, Getty, Sluce, or to cleanſe a River, if the ſame by his neglect be left undone or unrepaired, he is therefore amerceable. So if one be preſented for caſting Dirt, Sand, Ballaſt, or other annoyance into the Rivers or Streams, or for digging down the Banks, or for pulling down the Walls thereof; if the preſentment do not expreſs the ſame to be done with force, or therein be wanting the word *Purpreſture*, the Party preſented is then but amerceable therefore: So when one is tied to cleanſe the Rivers for paſſage of Boats and Ballangers, or for the draining of the waters, if he ſuffer Sandbeds to lie and choak up the Chanel, he is amerceable, and not fineable therefore; for no permiſſion, ſufferance, neglect or nonfeaſans can be found to be by force, becauſe they conſiſt not *in Agendo, & ſic in ſimilibus caſibus*; Yet ſome Caſes following fall out of theſe Rules *prout ſequuntur*. As if the violence of waters was ſo great, either by breaking in of the Sea in an extraordinary manner, or by a ſudden floud or inundation of freſh waters after a rain, that thereby the Defences are broken down, or cauſed Sandbeds or other Nuſances to be, theſe being preſented, no man is amerceable therefore, becauſe the ſame could not have been prevented by policy, nor reſiſted by ſtrength.

42 *lib. Aſſiz.* In 42 *lib. Aſſiz. plac.* 15. a Preſentment was, *That* J. S. *had ſuffered trees to grow into the water, and lay in the Stream, by reaſon whereof ſhips were hindred in their paſſage; and there was a Writ awarded directed to the Sheriff to remove the Nuſans:* but *Knivet* Juſtice ſaid there, *That* J. S. *ſhould not be amerced, becauſe the Nuſans was no Act of his, but the Trees grew ſo naturally of themſelves.*

But

But perhaps it will be objected to me, Can no Amerciaments be set but by a Jury, or by the Oathes of twelve men?

Yet, I am of opinion it may be done by the presentment of the Surveyors of the Sewers, for that is *per Sacramentum parium* as the Law appoints; and in a *Nonsuit* we see daily that in such case the Plaintiff is to be amerced, and this amerciament shall be assessed by the Coroners of the County, as appears in *Greisley*'s case; and so the Words of the Statute and of the Law may herein be satisfied. *Greisley*'s Case.

Now I hope I have fully instructed the Commissioners, wherein they may learn whom to imprison, when to fine, and how to amerce in a legal and orderly sort, and according to the ancient and approved Rules of Law, and of the grand Charter; for in those things they are to direct their discretions by the said Rules, and they are to be guided thereby, and are not to proceed therein according to their own wills.

And herein I shall conclude the Second point of this part of the Law, that is, That Commissioners of Sewers have power to imprison, to fine, and to amerce; And that *B.* for refusing to obey their Order was justly imprisoned, and *C.* was as justly fined: And for the reasons and causes aforesaid, the Commissioners in their discretions, though the offences of both were alike, yet they had power to imprison the one and to fine the other. And now I do intend to proceed to the Fourth Point of my Case, and the Third Point I intend to handle in a more convenient place.

Distress.

THE Point of Distress in my Case is grounded upon these words of this Law, *viz.* *And all those persons and every of them to tax, assess, distrain and punish, as well within the Metes, Limits and Bounds, of old time accustomed, or otherwise, or elsewhere within the Realm of* England. 4 Point.

Three ſorts of Diſtreſſes.

Firſt, There be divers kinds of Diſtreſſes (*viz.*) Judicial, which always iſſueth out of the Rolls of the Court.

Secondly, Miniſterial, and ſuch Diſtreſs is to be performed by the Officers of theſe Laws, without any judgment directing the ſame.

Thirdly, And there is a Diſtreſs of Common right, not given nor awarded by Judgement in Court, or by Warrant of the Commiſſioners, but incident to the thing it ſelf.

And Firſt of the judicial Diſtreſs which is awarded by the Court upon a preſentment found of a Nuſans, or in the recovery of an aſſize of Nuſans, or in an Action of the caſe, as it appears by the 42 *Aſſiz. plac.* 15. 32 *Edw.* 3. 23. and 7 *Henr.* 4. 8. there a *Diſtringas ad Amovendum* ſhall be awarded to remove the Nuſans; and ſo in caſe of a decay preſented: As if *J. S.* ſuffer a Bank or Wall to decay, and that be preſented, a *Diſtringas ad reparandum* ſhall be directed to the Sheriff to diſtrain *J. S.* to repair the ſame.

42 *Aſſiz.* pl. 15. 32 *Ed.* 3. 7 *H.* 4.

Secondly, A Diſtreſs Miniſterial is where one is aſſeſſed or rated to pay a certain ſum of money towards the repairing of a Wall, Bank, Sewer or Goat; here upon Warrant from the Commiſſioners of Sewers, the Officer expreſſed in that Warrant to diſtrain the cattel of the party which ought to pay the ſaid Rate and Seſs, and which did neglect to pay the ſame: And yet where there is a Rate and Seſs impoſed upon one by the Commiſſioners of Sewers, I am of opinion that the Collector or Officer may diſtrain therefore without any expreſs Warrant from the Commiſſioners ſo to do; and my reaſon is grounded upon the Statute which is this, becauſe the Statute and Commiſſion which be the general Laws, do of themſelves in this caſe give a Diſtreſs. And therefore in theſe caſes, the Warrant of the Commiſſioners is ſuperfluous, like to the Caſe in 20 *Eliz. Dyer: fol.* 362. where a fine was levied of Lands, to the intent that *J. S.* ſhould have and receive a yearly Rent thereout, although

20 *Eliz. Dyer.*

in

in the conveyances there was no mention made, that the party might diſtrain for the ſame: Yet in that Book it is mentioned to be adjudged, *That the owner of that Rent might diſtrain for the ſame, becauſe the Statute of* 27 H. 8. *in that Caſe gave a Diſtreſs:* Upon which Statute the ſaid conveyance was grounded. So if there be two Coparceners to whom Land doth deſcend, and they make partition, and for more equality, ſhe that hath the better part doth grant to the other and her Heirs a yearly rent out of her Land, but limits no clauſe or power of diſtreſs, ſhe to whom this yearly rent is granted may diſtrain therefore: And ſo may a Bailiff diſtrain for an amerciament in a Leet without a Warrant, becauſe the general Law gives a diſtreſs in theſe Caſes. 27 H. 8.

Thirdly, And as touching a Diſtreſs of common right, It is in caſe where one doth hold his Land of his Lord as of his Manor, to repair a Bank, Wall or other Work of Sewers; the Lord of whom theſe Lands be holden may diſtrain his Tenant of common right to compell him to make theſe repairs; and the Diſtreſs given in the ſaid Caſe of the Coparceners, and in the ſaid caſe of amerciament in a Court of Leet, ſeem both to be diſtreſſes of common right: And that the Law is, that a Diſtreſs lieth for a Rate, Lot or Tax impoſed by the Commiſſioners of Sewers, it is manifeſt by the Caſe of *Rook*'s in *Cook*'s 5th *Report*, which is full and direct authority in the point. *Rook*'s Caſe.

But yet note, That the Officer before he diſtrains, ought to give notice of the tax to the Party, and demand it, *Style* 13. *Style* 13.

In what place a Diſtreſs is to be taken.

NOW touching the place where theſe Diſtreſſes are to be taken, comes next into our conſideration, wherein the quality of the matter diſtrained for, and the power from whence the diſtreſſes are derived, are to be conſidered of.

And

And therefore if a Lord do distrain his Tenant *Ratione tenuræ*, for to repair a Wall, Bank or other defence, this distress must be taken on the Ground holden by this Tenure and not elsewhere, for these Grounds are chargeable therewithall, as the opinion of Justice *Sylliard* is 21 *Ed.* 4. *fol.* 38. But not as that case is, but in point of Tenure;

21 *Ed.* 4. for there the case was, That a presentment was found *in hæc verba videlicet Juratores present' quod est communis Regia via in Parochia Sancti Martini in Campis in Com' Middlesex inter Hospitia Episc' Dunelmensis & Episc' Norwich totaliter superundat' aquis & quod tam domini spirituales quam temporales & Justiciarii domini Regis & Servientes ad legem & omnes alii Legis ministri & omnes alii per viam illam versus Westmonaster' itinerantes pro legibus domini Regis ibidem ministrandis & observandis sepius impediuntur per quod via illa totaliter superinundata existit excessu emanationis aquæ pluvialis ibidem remanent' quam quidem aquam Episcopus Norwicensis ratione tenuræ suæ ibidem evacuare debuit & quod ipse & omnes predecessores sui ratione Tenuræ suæ ibidem evacuare debent:* And in this case I take it the Land was charged, not as in respect the Bishop of *Norwich* did hold the same of some Lord by the Tenure, to repair the Sewer to avoid the Water; but his Land stood charged with the same as a charge imposed thereon by Custome or Prescription, as by the President it self appeareth; for if the Bishop of *Norwich* had been by the Tenure of his house or Lands bound to avoid the Waters, there needed no Prescription to have been alledged.

5 *H.* 7. Also in 5 *H.* 7. *fol.* 3. there is a like Presentment made against an Abbot, *Quod ipse & predecessores sui*, ought to repair a gutter *ratione tenuræ terrar' suar'*; but because in that case the Presentment did not set forth where those Lands lay which were charged, the Presentment for that cause was holden to be void: So that there is a great difference between a Tenure charge, and a charge imposed upon Land by Prescription; For in the case where a Tenant holdeth his Land to repair a Bridge, Wall or Bank of the

Lord

Lord of the Fee, The Lord in this caſe may diſtrain the Tenant of common right by the Commonlaws of *England:* But where ones Land is charged by Preſcription and Cuſtome, there is no remedy to force and compell the Tenant to do the repairs but by Preſentment, and upon a Preſentment proceſs may be awarded againſt him to diſtrain him to make the repairs.

And if upon a Preſentment made by the Laws of Sewers, *J. S.* is charged to repair a Sewer, and a *Diſtringas ad reparandum* be awarded againſt him, the Sheriff may diſtrain the party in any place within the power of the Commiſſion of Sewers. But this being a judicial Diſtreſs which iſſueth out of the Rolls, the Juſtices are tied to the limits and bounds of the Commiſſion; Yet in 19 *H.* 6. *fol.* 7. the caſe was, *That the Admiral of* England *hath jurisdiction in cauſes ariſing onely on the Seas, and he hath no jurisdiction or power to meddle with any thing done upon the Land:* Yet upon a Preſentment made in the Admiral Court one was Preſented and Amerced, and a diſtreſs for this amerciament was taken on the Land, and exception was thereto taken, that the diſtreſs was taken out of the jurisdiction of that Court: But there *Newton* chief Juſtice and the reſt of the Juſtices ſaid, *That the power of the Admiral to hold plea was reſtrained by Statute to matters ariſing on the Seas, but Executions were not ſo.* 19 *H.* 6.

And I have farther obſerved by the Book of 8 *R.* 2. *Fitzher. Avoury* 253. that where no place is certainly preſcribed to diſtrain in, that in ſuch a caſe the diſtreſs may be taken in any place within the power and jurisdiction of the Court, out of which the Writ or Warrant of diſtreſs doth iſſue: As if one be amerced in a Court Leet or in a Court Baron, he may be diſtrained for theſe amerciaments in any place within the jurisdiction of theſe Courts; and for an amerciament ſet and impoſed in the Sheriffs turn a diſtreſs may be taken for it in any place of the County; for ſo far the power of that Court doth extend it ſelf. 8. *R.* 2.

Yet

Yet *quere* whether a diſtreſs can be taken for an amerciament in a Court Baron, in any other part of the Manor, ſave upon the Lands of the Offender: For in *Pill* and *Tower*'s Caſe, *Mich.* 42 *Eliz. C. B.* it ſeems to be the opinion of all the Juſtices of that Court, that ſuch a diſtreſs was not lawfull, unleſs there were a Preſcription for it; and in ſuch caſe ſome of the Juſtices held it good: but *Walmeſly* denied that the Lord could preſcribe to diſtrain for ſuch amerciament, anywhere within the Manor; *Crooke, Eliz.* 792.

Cro. Eliz. 792.

But in the caſe of a ſeſs, rate or tax impoſed by the Commiſſioners of Sewers, a diſtreſs for any of thoſe may be taken in any place within the Realm of *England*; for in this caſe the diſtreſs is meerly grounded upon the Statute, and is bounded by the ſame limits, which is as large as the Realm of *England*: And hereupon by this conſtruction made in this legal manner, all the words in the ſaid clauſe of this Statute have their full operation.

Rook's Caſe.

And although in *Rook*'s caſe the diſtreſs was there taken on the ground charged, yet that doth not prove but that a diſtreſs might have been taken in any other place; for I verily take it, that the place where the diſtreſs was taken, in that caſe was not intended any material point, though in my ſucceeding argument for another purpoſe I ſhall make it one. So that my opinion touching diſtreſſes to be taken in caſes of Sewers, appears to ſtand upon theſe three diſtinctions.

1. Firſt, that the Lord of whom the grounds be holden to make the repairs, muſt diſtrain on the grounds ſo holden, and not elſewhere.

Secondly,

Secondly, That upon a *Diſtringas ad reparandum* or *Amovendum* upon a Preſentment, which iſſueth out of the Rolls of that Court, and is a judicial proceſs, a diſtreſs muſt thereupon be taken within the bounds of the Commiſſion of Sewers *Ex congruitate.*

Thirdly, A diſtreſs for a rate, or ſeſs, or tax aſſeſſed and impoſed by the Commiſſioners of Sewers may be taken in any part or place within the Realm of *England*; for this is a diſtreſs grounded upon the Statute, and is as large as the extent thereof. And ſo the difference appears where the diſtreſs is guided by the Commiſſion, and where by the Statute.

Whoſe goods may be diſtrained.

IT comes now in turn to be handled, whoſe goods may be diſtrained and taken within theſe Laws. For the words of diſtreſs be put ſo generally in this Statute, that they muſt receive their expoſition by the Rules of the Commonlaw, in regard theſe Laws do give no ſpecial direction therein; and therefore the diſtreſs mentioned in *Rook*'s caſe may in this place be queſtioned: For there *Carter* was aſſeſſed, but the goods of *Rook*'s were diſtrained and taken for the ſaid aſſeſs, and no challenge or exception was there made of it; and no marvel, for it was ſpecially found that the goods were taken and diſtrained on the grounds charged, for otherwiſe that diſtreſs had been tortious; wherein I take this diverſity, That where grounds are chargeable to repairs of defences, and a Seſs is thereon impoſed by the Commiſſioners of Sewers, the goods of a Stranger may be taken therefore on the grounds ſeſſed; and this is warranted by *Rook*'s caſe. But *Rook*'s being a Stranger, his goods could not in any ſort have been taken for the Seſs impoſed upon *Carter*, but on the grounds charged: and the like Law for Rents and Services iſſuing out of Lands, the goods of a Stranger Levant and Couchant on the grounds ſo holden may be diſtrained for Rents and Services, by 7 *H.* 7. 2. and 11 *H.* 7. 4. *Rook's Caſe.* 7 *H.* 7. 11 *H.* 7.

But put the caſe a little farther, that in the Seſſions Court of the Sewers, *A. B.* is amerced for Non-payment of his Seſs towards the repairs of a work of Sewers; and in this caſe I am of opinion, that the proper goods of *A. B.* are to be diſtrained for this amerciament, and not the goods of a Stranger going on his grounds charged to the ſaid aſſeſs, becauſe this amerciament is a collateral charge, which falls on the perſon of the offender who was to pay the aſſeſs, and doth not in any ſort charge the grounds: and this opinion hath warrant from the caſe in 41 *Ed.* 3. *fol.* 26. *Br. Leet* 4. for there *A. B.* was amerced in a Court-leet, for receiving and keeping one in his Houſe which was not ſworn to the King; in which Caſe it was holden, that no Goods could be diſtrained for this amerciament, but onely the proper Goods of the Party amerced, although the Goods of others were levant and couchant on his Ground: And farther in proof of my ſaid opinion, the Caſe of the Lord *Cromwell* in 15 *El.* in *Dyer*, *f.* 322. doth come fully thereto, which is, That a Replevin in an avowry was made for a pein and forfeiture of ten ſhillings, due for the breach of a Bye-law, *Contra ordinem Curiæ*, and alledged to make Bye-laws within the Manor by the cuſtome thereof: In which Caſe it is apparent, that the proper Goods of the Party are to be diſtrained therefore, and not the Goods of a Stranger levant and couchant on the Grounds.

41 Ed. 3.

Dyer 322.

47 Ed. 3.

And in the 47 *Ed.* 3. *fol.* 12. the Prior of *Tindal*'s Caſe, where the Prior was amerced, and another Man's Goods were taken and diſtrained on the Grounds of the Prior for the ſaid amerciament, and the diſtreſs was not well taken; and ſo my opinion may be conceived, that for an aſſeſs the Goods of a Stranger may be diſtrained on the Grounds charged, but may not there be taken for a fine or amerciament, which be collateral duties, and attend upon the Perſon, and do not charge the Soil.

Although the Goods of a Stranger ſhall not be diſtrained for an amerciament, though they

are

are levant and couchant upon the Lands of the Party amerced; yet by the opinion of *Brampſton*, Chief Juſtice, *B. R.* 17 *Car.* 1. the Goods of an Undertenant may for an amerciament ſet upon his Landlord; and that without any particular cuſtome to warrant it: As where a cuſtomary Tenant is amerced for not repairing, in that caſe he held, that the Goods of his Under-tenant levant and couchant upon the cuſtomary Lands may be diſtrained for ſuch amerciament; *March* 161. *Thorne* and *Tyler*'s Caſe; *Tamen quere*, for the reaſon of that Caſe in 41 *Ed.* 3. 26. that the amerciament falls on the Perſon of the Offender, and the cauſe of the diſtreſs doth not ariſe *ratione ſoli*, as is ſaid in *Br. Leet* 4. holds as well in the Caſe of the Under-tenant, as of a mere Stranger; But if this opinion of *Brampſton* be Law, by the ſame rule, the Cattel of an Undertenant of a Perſon amerced in the Court of Sewers, if they are levant and couchant upon his Lands, may be diſtrained for ſuch amerciament.

March 161.

Br. Leet 4.

This diſcourſe being thus ended, I ſhall now enter into a matter of greater moment; and yet becauſe theſe matters be frequent in buſineſſes of the Sewers, that which I ſhall here pretermit I will in ſome other place more fully diſcourſe of.

Goods ſold.

THE farther matter of this point will reſt upon this, whether Goods diſtrained and taken for a Seſs and Rate of Sewers may be ſold, or not; which point hath been oftner practiſed than the Law truly decided: But before I ſhall touch upon the main, I will make an Ingreſs to treat of ſuch matters whereby the property of a Man's Goods may be altered without his conſent.

1. And firſt, at the Common-law, if a Man's Goods be wrecked, waived or taken as ſtrays, or ſold in Market overt, the property may be altered.

2. Secondly, by Cuſtome, as in *London* upon a Foreign Attachment Goods may be attached and ſold to another: and in 10 *El. Dyer, fol.* 279. *b.* a Cuſtome is alledged to be in *York* that Foreign Goods there bought and ſold are ſeiſable by the Corporation, and ſo in caſe of a Heriot Cuſtome.

Dyer 279.

3. Thirdly, But the King by his Charter cannot take the properties of my Goods from me, as in the Caſe of *London* *Cook's* Rep. the Caſe of *Auſten* and *Waltham*, where King *Henry* the 6th granted to the Corporation of Dyers there by Charter, *That if upon ſearch they ſhould find any Clothes died with Logwood, that they ſeiſe them as forfeit*; but reſolved, that this Grant was in that point void.

Caſe of the City of *London.*

4. Fourthly, By a Bye-law in a Court-leet or Baron, the property of my Goods cannot be taken from me.

5. And fifthly, By a judgment againſt one at the Common-law, although a Man's Perſon nor his Lands were liable thereto, yet his Goods were.

Theſe five Grounds being firſt taken, I ſhall now examine the particular of our Caſe in queſtion touching the Law made by the Commiſſioners for ſale of Goods; and againſt this ſale many things may be alledged.

1. Firſt, This Statute I reade on gives a diſtreſs, and a diſtreſs is but a gage or pledge, and cannot be ſold; for if a Lord

Lord distrain his Tenants Cattel for Rent and Services, he cannot sell the Distress: And although in 10 & 11 *Eliz.* *Dyer*, *fol.* 280. a return irrepleviſable was awarded to the Lord or Avowant, yet he cannot sell this distress, nor work them by the opinion of that Book. *Dyer* 280.

Secondly, The Statute of 7 *Jac. cap.* 20. *Rastal Marshes* and *Fens*, doth enact, that a Commission in the nature of this of ours should be directed to the Bishop of *Norwich*, and others for the recovery of Fen-grounds; where for an assess impoſed, and for Fines and Amerciaments, express power is given by that Statute to sell the Party's Goods which doth refuse to pay, *Ergo*, without such an express clause a sale of Goods could not have been lawfull. 2. 7 *Jac.* 20.

And by the Statute of 1 and 3 *Jac.* the forfeitures of Alehouſekeepers may be levied by sale of their Goods, by the express letter of these Laws: and so it may be inferred, that our Statute wanting such an express clause to authorise a sale, therefore no sale can be. 1 & 3 *Jac.*

But much may be said to the contrary; for although in cases of sale the Laws be tender, yet it is plain, that both our Common-law, Customs and Courts of Justice daily use them, and are frequent in those sales: And we know that a distress is properly a pledge to be detained till satisfaction be made, and then to be restored, and is not to be sold: Yet in 3 *H.* 7. *fol.* 4. a distress taken for an amerciament in a Leet or Law-day may be sold as well in the case where the Subject hath by Charter or Prescription the profits of the said Courts, as where the King himself hath them; and all the reason which that Book yieldeth for it, is, because they be the King's Courts; And so it was likewise resolved in *Godfrey*'s Case, *Roll* 1. 76. and the reason there given why such a distress may be sold, is, because it is for a publick matter: But a distress taken for an amerciament in a Court-baron cannot be sold; no not although it be a Court-baron of the King's 3 *H.* 7. *Roll* 1. 96.

Bulſtr. 1. 53. King's; *Bulſtrode* 1. 53. And in 22 *Aſſiz. plac.* 72.
22 *Aſſiz.*
Cro. Jac. 255. and *Cro. Mich.* 8 *Jac.* 255. it is ſaid, *That if one recover a debt in a Court-baron, the Goods of the Debtor could not be ſold therefore*; At leaſt, if there be not a cuſ-
Brownl. 1. 41. tome to warrant it; for by the opinion in *Brownlow* 1. 41. it ſeems that Goods may be ſold upon a *Levari facias* out of a Court-baron, if there be a cuſtome for it. Yet I have ſeen always in practice, that for debts and damages recovered in the County Courts, the Goods of the Debtors have and be uſually ſold for them by *Levari facias*; and in my opinion this is uſed *per totam Angliam*: and a ſale in ſuch a caſe in a Court-baron by cuſtome is good; and with this agreeth the Book
7 *H.* 4. of 7 *H.* 4. *fol.* 27. and 21 *H.* 7. *f.* 40. in a Leet-court one
21 *H.* 7. preſcribed and alledged a cuſtome to have of every one which made an affray within his Liberty, a certain ſum of money, and preſcribed alſo to diſtrain for it, and to ſell the
11 *H.* 4. diſtreſs: and with this agreeth 11 *H.* 4. 14. and 11 *H.* 4. *fol.* 2. A diſtreſs taken for the Knights Fees of the Parliament was ſold. Therefore now let us ſee and examine well by what authority our Officers of Sewers may ſell the diſtreſſes taken. The words in our Statute which are moſt powerfull in this point, be theſe, (*viz.*) *To depute and aſſign diligent, faithfull and true Keepers, Bailiffs, Surveyors, Collectors, Expenditors, and other Officers for the ſafety, conſervation, reparation, and making, repairing, reforming and amending of the Premiſſes and every of them, and to hear the accompt of the Collectors and other Miniſters, of and for the receipt and laying out of the money that ſhall be levied and paid in and about the ſame*: Here is the word (*Levy*) uſed, and money levied is properly upon a ſale, execution or forfeiture; And the words of our Statute go farther, (*viz.*) *And to diſtrain, or otherwiſe to puniſh the Debtors and Detainors of the ſame by fines, amerciaments, pains, or other like means after their good diſcretions*; and no likelier means

to

to these is there any, than to make sale of the Debtor's Goods for non-payment of his sess, and it is consonant to other Laws: also in another part of this Statute are used these words, *And the Clerk by the Commissioners to be assigned to have two shillings* per diem *of the rates, taxes, lots and waives as shall be assessed or lost by authority of the said Commission, to be levied and paid by their discretions:* And so it seemeth by the very express letter of this Law, the taxes, sesses and rates may be levied by the discretion of the Commissioners, which if they please may be by sale of the Offender's Goods: And in many parts of this Statute, the Justices of Sewers have power to make Laws, Ordinances and Decrees, which being done according to reason, shall be held for firm and inviolable: And therefore upon just cause in my opinion, the Commissioners may make a Law or Ordinance for the sale of Goods in furtherance of this service; and this being a Law which tendeth so much to the service of the Commonwealth, and is so profitable and commodious for the same, it is therefore good reason to extend the same, and the exposition thereof, as far as the Letter and intent of the Letter shall reach; which may be as far as shall stand with reason, and rules of other Laws, Statutes, Customs and Usages of other Courts which have power in sale of Goods in causes of this nature, and is not altogether without president: For in the Charter of *Romney Marsh, pag.* 36, & 37. It is said in these words in a debate between *Hamo* and *Godfrey*, *Et predictus Hamo concessit pro se & aliis quod computabit cor' vigint' quatuor Jurat' elect' de patria super districtionibus & averiis capt' predicti Godfredi pro predict' Walliis & watergangiis repar' ab initio istius placiti usque nunc, &c. & districtiones illas secundum quantitatem portionis sibi contingent interim pro predict' Walliis & watergangiis reparandum sicut predict' est per predict' districtiones quod idem Hamo & alii satisfacient in omnibus quod injunctum fuerit per predicti comput' inter eos de surplusagio recepto de averiis venditis predict' Godfredi occasione predict'.* Hereby it is manifest, that *Hamo* the Bailiff sold the Cattel

Ch. *Romney Marsh.*

of

of *Godfrey* to make the repairs of the Walls and the Waterganges; and our Statute gives power to the Commiſſioners of Sewers to doe after the cuſtoms of *Romney Marſh*, which by this preſident formerly vouched, warrants the ſale of Goods.

And it was ruled in the Caſe of *Combs* and *Cheny*, *Mich.* 24 *Car.* 1. *B. R.* that the Commiſſioners of Sewers may ſell a diſtreſs, *Aleyn* 92.

Aleyn 92.

Yet herein I am of opinion, that the Bailiffs which diſtrain cannot *Ex officio* without a ſpecial Warrant firſt directed to them for that purpoſe from the Commiſſioners, make ſale of Goods diſtrained for a lay, tax or ſeſs of Sewers; And I take it, it were a good Warrant for the Commiſſioners to make an adviſed ſpecial Law of Sewers for ſale of Goods diſtrained upon a juſt occaſion, before they direct any Warrant *Ex ſubito* to the Bailiffs, or for any ſuch purpoſe.

But now herein follows a matter of ſome conſequence, and worthy the handling, That if by the Laws of Sewers goods may be ſold towards the repairs of theſe works, as in my opinion they may, Then whoſe goods may be ſold is the queſtion next to be decided; wherein to be brief, I am firm of opinion, That no goods can or ought to be ſold by the power of theſe Laws of Sewers, but onely the proper goods of the party ſeſſed and taxed, though the goods and chattels of other men be Levant and Couchant on the grounds ſeſſed to the repairs: For I hold it not conſonant to reaſon, nor that it ſtands with any rule of Law, That the goods and chattels of a ſtranger ſhould be abſolutely taken away from him, and ſold for the dept and default of another man. And to this purpoſe the caſe put in the 3 *El. Dyer*, *f.* 199. may fitly be applied to this point, where a cuſtome is alledged for a Lord of a Manor to have and take the beſt Beaſt which his Tenant had at his death; and if ſuch beſt Beaſt ſhould be eſloyned, that then he might have and take the beſt Beaſt of any other Levant and Couchant upon

3 *Eliz.*

upon the Land; and this was adjudged a void cuſtome, as to the goods of a ſtranger to be made ſubject to ſuch a forfeiture.

It ſeems queſtionable, whether the Rule, That no goods can or ought to be ſold by the power of theſe Laws of Sewers, but onely the proper Goods of the Party ſeſſed and taxed, be ſo general, as is here ſet down; For if a man be taxed in reſpect of his Land, and he ſells or lets the Land to another, it ſeems reaſonable that the Goods of the Aſſignee may be diſtrained and ſold for the tax, becauſe the ſame is a charge upon the Land, into whoſe hands ſoever it comes; And the reaſon here given by our Reader why no Goods but thoſe of the Party aſſeſſed ſhould be ſold, *viz.* that it ſtands not with any rule of Law, That the Goods and Chattels of a Stranger ſhould be abſolutely taken away from him, and ſold for the debt and default of another man, holds not in this caſe; for the Aſſignee is not a Stranger to the Land, nor conſequently to the debt, for he takes the Land *cum onere*; and this ſeems to be the meaning of what is ſaid in *Style* 13. in the Caſe of *Whitley* and *Fawſett*, *B. R.* That for nonpayment of a tax impoſed by the Commiſſioners of Sewers, the Cattel of the Owner of the Land taxed, or of his Aſſignee, may be diſtrained and ſold; But a Stranger's Cattel upon the Ground cannot be ſold. *Style* 13.

Thus far I have purſued my argument in diſcourſing upon theſe diſtreſſes, and touching ſuch matters as do depend thereon, becauſe in my experience I have found them the readieſt part of the execution of theſe Laws; and I have heretofore beheld much enormous proceedings therein, both in the Commiſſioners and in their Officers, and therefore I thought it very needfull to have treated thereon for their better direction in theſe affairs hereafter.

Replevins.

YET as I find diſtreſs to be the moſt uſefull execution of theſe Laws of Sewers, ſo I have ſeen the proceedings therein much ſtayed and interrupted by the uſual ſuing of *Replevins*, by which means the ſaid diſtreſſes taken by the authority of theſe Laws have been ſet at liberty, and the work of Sewers hath been much letted and hindred thereby. And therefore the fifth point in my Caſe doth miniſter a good occaſion to enter into the ſerious examination of them.

And now my intent is, to declare in what caſe a Replevin doth lie, and where not; and ſurely this point hath heretofore been much ſtirred in, and not without ſome cauſe, for the very Statute ſeemeth to allow of Replevins in theſe words, (*viz.*) *That if any action of Treſpaſs, or any other Action ſhall be attempted againſt any perſon for taking any Diſtreſs, or for any other thing concerning the Law of Sewers, that the Defendant in ſuch Action may make Avoury, cogniſance or juſtification, that the taking of the ſaid Diſtreſs, Treſpaſs or other Act, whereof the Plaintiff complained was done by the authority of the Commiſſion of Sewers, for a Lot or Tax aſſeſſed by the ſaid Commiſſion, or for other ſuch act or cauſe as the Defendant did by the ſaid Commiſſion*: And in what action can a man ſo properly make his avoury, Cogniſance or Juſtification as in a Replevin, being a word onely apt for that action; and a Diſtreſs is *de ſua natura*, properly repleviſable by the Commonlaw: and for direct authority in the point,

point, it appears in *Rook*'s case, that a Replevin was there sued for the delivery of the distress taken by the power of these Laws of Sewers: But I must here distinguish, for I am of opinion a Replevin doth not lie, nor ought not to be granted from the Sheriff, or any of his Deputies, for that the Sewer is a Judicial Court of Record, and of greater authority than the power of the Sheriff, which in these cases was but Ministerial; and the highest authority that he hath is but vicontiel, which is much inferior to the power of this Commission; and therefore the Sheriff is not of sufficient power to supersede a Court of higher power Yet if one sue a Replevin, which afterwards in Bank was abated, and a return of the Cattel there awarded, another Replevin did lie by the opinion of the Book of 34 *Henr. 6. fol.* 37. and so it appeareth by the Statute of *Westminster*, *chap.* 2. but these new Replevins came out of the said Courts where the former was, for it is not likely, that the Sheriff could make deliverance by his Warrant of Cattel, contrary to the award and return of a Court of Justice in a *Retorno habendo*; and therefore by the same Statute the *Secunda deliberatione*, is now to be awarded out of the Rolls of the Court whence the *Retorno habendo* came: And if one would resemble this case with other authorities, and with the reason of other Book cases of the Law, it will be made thereby apparent, that the higher Court may take or remove a cause out of the inferior Court, but not *E contra*, neither can the inferior Court supersede the superior: For if one be impleaded in the King's Court at *Westminster*, and in coming towards *London* he is arrested in a Corporation Court, he may be delivered thence by the power of the superior Court to the which he was attendant, and the power of the inferior Court shall be superseded thereby, as the Law is declared in divers of our Books; By the which it is plain, that ones person being in the privilege and protection of the King's Court, could not justly be imprisoned by the power of an inferior Court: And in *Stringfellow*'s case in 3 *Ed.* 6. *Dyer fol.* 67. The goods of one were seized by the

Rook's Case.

34 *H.* 6.

3 *Ed.* 6.

Sheriff by proceſs out of the Chancery for a ſubject, and after ſeiſure, and before delivery thereof was made, a Writ of Prerogative came out of the Exchequer, rehearſing thereby, that the King was to be ſerved before any other, and commanding the Sheriff to levy the ſame on the goods of the ſame Debtor; And whether theſe goods that lay under the power of a Proceſs in one Court might be taken from thence by the power of another Court, was the queſtion; and the better opinion therein, as I take it was, that they could not, for that by the former Proceſs they were privileged from all other Jurisdictions, powers and authorities, eſpecially if they were of an inferior degree: Yet there be two caſes which not being curiouſly looked into make ſhew as if the Law were otherwiſe; the one is in the 11 *Hen.* 4. *fol.* 2. where the goods of *J. S.* were taken in Execution by the Sheriff by a *fieri facias* which came out of the King's Court of *Weſtminſter*, and the Sheriff ſold them to *J. D.* and there was a Replevin ſued in that caſe, but no deliverance made of the Cattel in Court: and the other caſe is in 7 *Hen.* 4. *fol.* 28. goods were taken by a Levy which iſſued out of a Court Baron, and they were ſold by the Bailiff, and there was alſo a Replevin ſued, but no deliverance made of the Cattel in Court, neither would the Court order the defendant to gage deliverance: ſo that by theſe two caſes it may ſeem that a Replevin did lie, though another Court had formerly the jurisdiction of the Cattel taken by the diſtreſs: But, under favour, I hope I ſhall eaſily reconcile theſe Books, and ſhall make it to appear that they do not make againſt my opinion formerly delivered upon this diverſity, That when the Goods were ſeized or taken by Proceſs, and remained by the vertue thereof in the hands of the Sheriff or of his Bailiffs, during that time no Replevin did lie in the caſe; but after ſuch time as the goods or cattel were ſold away, as in the ſaid two caſes formerly alledged they were, then againſt the party that bought them, or any other, a Replevin did lie in the caſe; for after the ſale they were out of the protection of the former parties,

11 *H.* 4.

7 *H.* 4.

and

and then a Replevin might well take hold of them, being out of all other Jurisdiction. And the same difference I take in this case of the Sewers, that is, That so long as goods distrained by Warrant and Process out of this Court of Sewers remain in the custody thereof, they be not repleviable by the Warrant of the Sheriff or of his Deputies, but after they be sold away, then by the sale thereof they are out of the protection and privilege of the Court of Sewers, and then the Sheriff may cause them to be delivered by Replevin. Yet it may be objected unto me, that in *Rook's* case a Replevin was taken against him which detained the distress by Warrant of the Commissioners of Sewers; it is true, the Book is so, which case I admit, and that the Replevin was well granted there; yet I take it, it doth not contradict my said opinion, because there *Carter* was assessed, but the goods of *Rook's* were taken and detained for the Sess, and *Rooks* did sue the replevin, which he might well do, because against him or his goods there was not any Law of Sewers extant or in force, neither was he or his goods within the privilege or jurisdiction of these Laws of Sewers: But if *Carter's* Cattel had been taken, who was the very party sessed, he could have had no Replevin from the Sheriff or his Deputies to deliver his Cattel.

But although a Replevin doth not lie in the case aforesaid from the Sheriff or his Deputies, *Ex officio* to deliver a distress of Sewers, yet out of the King's Court at *Westminster* a Replevin doth lie in those cases: And the Charter of *Romney Marsh pag.* 18. doth afford us in this case a very good President; for there complaint was made to the King, setting forth thereby, That whereas his Highness had appointed and authorized *Henry de Bathonia* to be his Justice, and to determine the differences depending and touching the repairing of the defences of the said *Marsh*, he had ordained, that distresses might be taken according to the 24 Jurators, *Ita quod nullus vicecomes aut alius balivus noster intromittat in districtionibus illis, tu tamen* (meaning the Sheriff

Ch. *Romney Marsh.*

Sheriff of *Kent*) *nihilominus diſtrictiones illas propter hoc factum per vigint' quatuor Juratores in prejudicio conſiderationis eorundem reluxaſti, tibi igitur precipimus quod diſtrictionibus illis in nullo te intromittas*; and in the ſame Charter the like matter is there alſo ſo determined of *pag.* 7. By the which may be collected, that the Sheriff *Ex officio* might not meddle with ſuch diſtreſſes: and in the ſame Charter, *pag.* 8. the words be farther, *Quod ſi quis de conſideratione predict' diſtrictionis ſe injuſte gravat' ſentiret & inde conqueri vellet ad ipſum Dominum Regem querelam ſuam deferret & ipſe in Curia ſua juſtitiam fieri facere reſervaſſet*; whereby it is manifeſt, that a Replevin lay for a diſtreſs taken in the King's Courts, for that they be of a ſuperior authority and juriſdiction to theſe inferior Courts of Sewers: And therefore the Replevins which our Statute aims to give way to, are intended to be taken out of the King's Courts, which in Law and Juſtice ought to be obeyed, and not from the Sheriff or his Officers by virtue of their Office onely.

But in my caſe the Commiſſioners made a Law, that the goods of *A.* ſhould be ſold without allowance of Replevin, which is a good Law upon the diſtinctions and diverſities aforeſaid; that is, that *A.* who was the perſon aſſeſſed might not have or take a Replevin becauſe he was a perſon bound expreſly by the Law, nor that the Sheriff or his Officers *Ex Officio* might grant a Replevin to deliver the ſame, being under the power of this Law of Sewers.

But the King's Courts at *Weſtminſter* may in thoſe caſes of Sewers deliver the diſtreſſes; and this conſtruction made of this Statute, as I take it, ſtands with Laws and Reaſon.

31 *Ed.* 3. And in the 31 *Ed.* 3. *Brook*, *Replevin*, *plac.* 60. the Caſe is put, a man did grant to *A. B.* a rent out of his grounds, with power that if it were behind that he might diſtrain therefore, and detain the diſtreſs againſt gages and pledges; and yet it was adjudged, that if the rent were behind and the grantor diſtrained, he could not detain this diſtreſs againſt the Replevin: Yet here were the direct words of the party himſelf to the contrary, but his words could not overrule

verrule the Law: So that upon all theſe matters, I hold theſe Tenents following.

Imprimis, To make a general Law to reſtrain all Replevins, granted either from the Sheriff or the King's Courts, is no good Law or Ordinance of Sewers; for that Replevins *de jure* are in ſuch caſes grantable out of the King's Courts, and ſuch a general Law ſavours too much of oppreſſion, in ſtopping up the Gates of Juſtice. 1.

Secondly, For a Sheriff or his Deputy to grant and award Warrants of Replevin *Ex Officio*, to deliver goods or cattel diſtrained, and detained for a Tax and Law of Sewers, is in my opinion againſt Law, and need not to be obeyed, for that the diſtreſs was *Sub protectione ſuperioris Curiæ*, which is of a higher degree than a Sheriff's Miniſterial Warrant. 2.

Thirdly, If a diſtreſs be taken and ſold for a Seſs of Sewers, a Replevin lieth againſt the buyer, for by the ſale the goods and cattel were put out of the protection of the Court of Sewers. 3.

Fourthly, If a Rate or Tax be impoſed by the Laws of Sewers upon *J. S.* and the goods of *John a Downs* be taken therefore on the grounds of *J. S.* which were charged, *J. D.* may ſue a Replevin of his ſaid cattel from the Sheriff, for that he nor his goods were not expreſly bound by the Laws of Sewers. 4.

Fifthly, A Replevin lieth out of the King's Courts of *Weſtminſter*, to deliver a diſtreſs taken and detained by the Laws of Sewers, for that they be Courts *de altiore natura*, Agreeable hereunto is the Opinion of *Heath* Juſtice *B. R.* in the Caſe of *Commins* and *Maſſam*, That the Proceedings of the Commiſſioners of Sewers are examinable in the *King's Bench*, upon a Replevin brought there; *March* 198. *March* 198. 5.

Sixthly,

6. Sixthly, A diſtreſs taken by a Lord on his Tenant for not repairing a work of Sewers, which by the Tenure of his Land he ought to do and repair, the Tenant may ſue a Replevin from the Sheriff *Ex Officio* to deliver the diſtreſs, for that this diſtreſs was not taken or detained by Warrant, Judgment or Decree of Sewers.

7. Seventhly, If upon a Judgment given in the King's Court, or upon a Decree made in this Court of Sewers, a Writ or Warrant of *Diſtringas ad Reparandum*, or of that nature be awarded, and the parties goods be thereby taken, theſe goods ought not to be delivered by Replevin to be taken either out of this Court, or out of any other Court of the King's, becauſe it is an Execution out of a Judgment.

8. Eighthly, Although one grant a Rent out of his Land with clauſe of diſtreſs, and with Grant or Covenant that the Grantee might diſtrain and detain this diſtreſs till he ſhall be ſatisfied his Rent, Yet a Replevin lieth in that Caſe.

A perpetual charge.

SO now I have fully and at large declared my Opinion touching diſtreſſes and replevins; wherein, I hope, I have fully ſatisfyed the firſt point of my Caſe: I intend therefore now to proceed to the ſixth point, which concerns charges and ſales of Lands to be made by the Commiſſioners of Sewers by the power and authority of this Law.

And Firſt, I ſuppoſe the queſtion may be extended to this, that is, Whether the Commiſſioners of Sewers can impoſe a perpetual charge upon Land to repair a work of Sewers for ever by the power of theſe Laws.

I do here acknowledge, that this is a knotty Point, yet ſomething may be alledged in maintenance of this Opinion affirmatively: For in the parts of *Holland* in the County of *Lincoln*, almoſt every one knows which part he is to repair and maintain in perpetuity; And *Experientia eſt optima*

tima interpres rerum; And it appeareth by the Charter of *Romney Marsh*, *pag.* 12. That the use there was to impose perpetual charges on singular persons; For the words there be these, *Juratores per eor' sacrament' mensurabunt per perticam omnes terras & Tenementa quæ infra dictum Mariscum periculo subjacent quibus mensuration' factis viginti quatuor per communitatem prius electi & jurati habito respectu ad quantitatem Walliar' terrar' & Tenement' quæ periculo subjacent per eor' sacrament' ordinabunt quantum ad predictarum Walliar' sustentationem & reparationem faciend' & sustinend' ad quemlibet pertineat, ita quod proportion' acrar' terrar' periculo subjacent' singulis assignetur sua portio perticar' & predict' assignatio fiat per locos certos ita ut scietur ubi & per quæ loca, ad quantum, singuli defendere teneantur.* These words in this Charter seem to be plain, That by the Laws established in *Romney Marsh*, the Commissioners had power to assign to every man his portion to repair in perpetuity; but I find no such words in our Statute: And whereas it may be said, that our Commissioners have power to make sale of the Lands; *Ergo*, They may charge them perpetually; but this is a *non sequitur* for that, for the sale they have express Warrant, but not so for the charge; And powers and authorities must be duly pursued, and are not to be taken by equitable or argumentable collections or implications, so that it may seem the Laws of Sewers were never held so perdurable as to bind mens Lands with perpetual charges: And therefore this difference I take, That by the custome of a Town or Countrey, every one may know his particular portion, which the owners of grounds are obliged and bound to repair perpetually; but without such a Custome it hath been held, That the Commissioners of Sewers cannot bind any mans inheritance to a perpetual charge, by any power or authority given by this Statute; but in the said case of *Romney Marsh*, the Custome there maintained this point: yet *Nota bene verba hujus Statuti*, which be these (*viz.*) *And to make and ordain Statutes, Ordinances and Provisions from time to time as the case shall require, for the* Ch. *Romney Marsh, p.* 12.

ſafegard, conſervation, redreſs, correction and reformation of the Premiſſes and every of them, and the parts lying to the ſame, neceſſary and behoofefull, after the Laws and Cuſtoms of Romney marſh *in the County of* Kent, *or otherwiſe, by any ways or means after their own wiſedoms and diſcretions:* Theſe be the words, and this is the clauſe which muſt make good this perpetual charge, for that it doth formerly appear, that ſuch like Laws and Cuſtoms there were in *Romney Marſh* as this is; and therefore I may conclude this point, that the Commiſſioners in imitation of the ſaid Ordinance of *Romney Marſh*, may make Decrees to bind Lands to perpetual charges; Yet Sir *Edward Cook* in *Keighley's* caſe ſets it down as reſolved, *That the ſeveral Commiſſioners of Sewers throughout all* England, *are not bound to purſue the Laws and Cuſtoms of* Romney Marſh; but in caſe where ſome particular place within their Commiſſion have ſuch Laws and Cuſtoms as *Romney Marſh* hath, there they might purſue them. But in my own Opinion, the Commiſſioners may, if they pleaſe, make Ordinances and Laws like to thoſe of *Romney Marſh*, where there hath not been any ſuch uſe; and the words of the Statute, as I take it, will bear that conſtruction; and the ſaid Opinion of Sir *Edward Cook*, is not directly againſt this. And upon Decrees for ſales of Land, it is uſual in thoſe Decrees to bind thoſe Lands to the perpetual repairs.

Keighley's Caſe.

Sales of Lands.

THE words of the Statute which be made for ſales of Lands be theſe, *Provided always, That if any perſon or perſons being aſſeſſed or taxed to any lot or charge for any Lands, Tenements or Hereditaments within the Limits of any Commiſſion hereafter to be directed, do not pay the ſaid lot and charge according to the Order and Aſſignment of the Commiſſioners, having power of the execution of the ſaid Commiſſion,* &c. *by reaſon whereof if it ſhall happen, the ſaid Commiſſioners for lack of payment of ſuch lot and charge to decree and ordain*

ordain the ſaid Lands and Tenements from the owner or owners thereof, and their Heirs, and the Heirs of every of them, to any perſon or perſons for term of years, term of life, in Fee ſimple, or Fee tail, for payment of the ſame lot and charge: Then every ſuch decree and ordinance ſo by them made, ingroſſed in Parchment, and certified under their ſeals into the King's Court of Chancery, with the King's royal aſſent had to the ſame, ſhall bind all and every perſon and perſons that at the making of the ſame Decree had any intereſt in ſuch Lands, Tenements and Hereditaments in uſe, poſſeſſion, reverſion or remainder, their Heirs and Feoffees and every of them, and not to be in any wiſe reformed, unleſs it were by authority in Parliament hereafter to be ſummoned and holden within the Realm.

And alſo that the ſame Laws, Ordinances and Decrees to be made and ordained by the Commiſſioners, or any ſix of them, by authority of the ſaid Commiſſion, ſhall bind as well the Lands, Tenements and Hereditaments of our Sovereign the King, as all and every other Perſon and Perſons, and their Heirs, and ſuch their intereſt as they ſhall fortune to have in any Lands, Tenements and Hereditaments, or other caſual profit, advantage or commodity whatſoever they be, whereunto the ſaid Laws, Ordinances and Decrees ſhall in any-wiſe extend, according to the true purport, meaning and intent of the ſaid Laws.

This Clauſe or Proviſo was ſtrangely placed in this Statute, as if this Statute had not been the firſt Father of it, and as if this Law had made ſome addition to a former Law: But I take it, that this Statute was, and is, the firſt and onely Law which gave ſale of Lands in Caſes of Sewers, and this Clauſe ſtands upon theſe four Pillars.

Imprimis, For what cauſe Lands may be ſold by the Commiſſioners of Sewers. 1.

Secondly, What Lands are to be ſold within theſe Laws. 2.

Thirdly, What Perſons, what Eſtates and Intereſts are to be bound thereby. 3.

4. Fourthly, To what Perſons theſe Lands may be ſold or decreed.

The Statute is, *If any Perſon ſeſſed do not pay*; whereby it is manifeſt that the Lands are to be ſold for ſeſſes and charges impoſed by the Commiſſioners which lieth in payment onely, and they may not be decreed away for any other cauſe or matter: And therefore if one hold his Land to repair a Wall, Bank, Sewers or other work of Sewers, and he neglect to repair the ſame, the Commiſſioners of Sewers cannot for this cauſe decree the Lands away from the Owner, becauſe this charge lay not in payment: And I cannot gather out of the words of this Statute, that Lands can be decreed for any cauſe than for non-payment of a lot ſeſs or charge, by reaſon this word *payment* is reiterated three or four times in this branch of the Statute, and no other words be coupled with it to infer any other or larger expoſition.

If *J. S.* do hold his Lands of the Lord of a Manor, by the payment of twenty ſhillings yearly or other ſum, towards the repairs of a work of Sewers, and he do neglect to pay the ſame, whereby the Work is unrepaired, although this is a charge which lieth in payment, yet becauſe it grows due by Tenure by the Common-lay, and was not impoſed by the force of this Statute, therefore the Lands of *J. S.* cannot be decreed from him by the non-payment thereof, by the tenor and virtue of this Law of Sewers.

But if the Lands of one be generally charged to repair ſuch a Wall or other work of Sewers by preſcription, covenant or otherwiſe, and the Commiſſioners impoſe a ſeſs and rate upon him to repair it, and he do not, there in this caſe, although the charge was by the rules of the Common Laws, yet becauſe the ſeſs and rate was ſet upon him by the power of this Statute, I am of opinion, that for neglect of payment the ſaid Lands may be ſold by the Decree of the Commiſſioners of Sewers.

So if one do hold his Lands for the payment of twenty ſhillings to repair a Bank, and the Commiſſioners of Sewers do

do order the Party to pay the twenty ſhillings at a time by them preſcribed (not being contrary to the uſual days of payment) and he do neglect to pay, The Commiſſioners may decree his Lands from him, becauſe this charge, by reaſon of the ſaid Order, had got the force and power of this Statute.

If a charge be generally laid upon a Townſhip, Hundred or Rape, which is not paid according to the Commiſſioners Order, no Lands can be decreed in this caſe, becauſe no Perſons or Lands be in this caſe particularly charged, and the Decree of the ſale muſt be directed by, and depend upon the ſeſs: but if after the general ſeſs be laid, the ſame be after aſſeſſed upon particular Perſons by particular ſums by the ſaid Commiſſioners, then upon default of payment, their Lands making default may be decreed from them by the power of this Statute.

If an aſſeſs or charge of payment be laid upon certain Lands without mentioning the Owner, the Lands cannot be decreed from him by this Law; for the words of the Statute be (*That if any Perſon or Perſons aſſeſſed to any lot or charge do not pay.*) So that I ſhall take it, that no decree for ſale of Land can be made but where there is a Perſon certainly aſſeſſed by name.

Lands cannot be decreed away from the Owners for default of payment of fines, amerciaments or pains; for though theſe be ſums of money or charges impoſed by the Commiſſioners of Sewers on Perſons certain for matters touching theſe Laws, yet becauſe they were not ſeſſed or rated towards the repairs of any works of Sewers, but be ſet upon the Parties as mulcts and puniſhments, and be due to the King, therefore no decree of Lands can be made for any of them.

Now the ſecond part of this Clauſe is, what Lands may 2
be decreed by the authority of the ſaid Statute; and thereby it appears they muſt be ſuch Lands as lie and be within the power of this Commiſſion of Sewers; and herein reſts a difference between the caſe of a diſtreſs for a ſeſs which

may

may be taken in any place within this Realm, and the decree of ſale of Lands for non-payment of a ſeſs which muſt lie within the bounds and extent of the Commiſſion; for this diſtreſs is circumſcribed to the extent of the Statute, which is over the whole Realm, and the ſale is tied to the limits of the Commiſſion: And I am alſo of opinion, that no Land can be ſold away by the decree of the Commiſſioners of Sewers, but ſuch as were charged with the ſeſs.

If one hold his Lands in *Comitat' Eborum* to repair a Sea-bank in the County of *Lincoln*, and the Owner is aſſeſſed therefore, and makes default of payment, the Commiſſioners of Sewers in the County of *Lincoln* may give warrant to diſtrain for this ſeſs in the County of *York*; but they cannot decree away by ſale thoſe Lands lying there which were charged with the ſeſs.

A Copyholder's Land cannot be decreed againſt him by this Law, for if it might, then theſe cuſtomary Lands ſhould be transferred from one to another, contrary to the Cuſtoms of the Manors whereof they be parcel; and it would infringe that rule which is delivered in *Heydon*'s Caſe in *Cook*'s 3d *Report*, which is, when an Act of Parliament doth alter the ſervice, tenure and intereſt of the Land or other thing, in prejudice of the Lord, or of the cuſtome of the Manor, or of the Tenant, there the general words of ſuch a Statute do not extend to Copyholds: And in this caſe if any ſale ſhould be made by the Commiſſioners, all the ſaid Rules ſhould be infringed, for it were contrary to the cuſtome to paſs theſe Lands without ſurrender; it were in prejudice of the Lord to have Copyhold-land paſſed, and he to have no fine: And I am likewiſe of opinion, that the Freehold of theſe Lands could not be paſſed away for a ſeſs or a lay, becauſe the Lord hath but the ſhadow, and the Copyholder hath the ſubſtance; But if the Lord's Rents of Aſſize ſhould be aſſeſſed as they ought to be, and he do neglect to pay, then theſe Rents might be decreed from him; and ſo may all other Lands, Tenements and Hereditaments decreed, in reſpect whereof one is ſeſſable and ſeſſed by theſe Laws.

Heydon's Caſe.

The

The third branch of this Clauſe is the direct point in my Caſe (*viz.*) *What Perſons and what Eſtates be bound by theſe decrees?* And firſt of the Heirs in tail, whether they be bound by a decree made againſt the Donees in tail their Anceſtors, is the queſtion; In the handling whereof I hold it fitting, to ſhew in what caſes the Heirs in tail have been bound by the act of their Anceſtors, and the reaſons and cauſes thereof. 3.

And therefore if a Diſſeiſor make a gift in tail, and the Donee in tail grant a rent to the Diſſeiſſee for releaſe of his right, this will bind the Heir in tail, for that by this releaſe his Eſtate, which before was defeiſable is now confirmed, as by the Books of 44 *Ed.* 3. 22. and 20 *Ed.* 4. 13. appeareth: and ſo in 46 *Ed.* 3. a gift in tail was made *Ita quod* the Donee might alien to the benefit of the Heirs in tail; and this by Judge *Welbey* was held a condition which bound the Heir in tail for his benefit: And in 12 *Ed.* 4. 1. *Tregouſe* and *Taltarm*'s Caſe was, That a recovery againſt Tenant in tail, with a Voucher by him over, did bind the Heirs in tail, by the Common-law, by reaſon of the intended recompence which was to come to him by the Voucher; and ſo a lineal warranty with aſſets, and a collateral warranty without aſſets, were and be both of them bars to the Iſſues, by reaſon alſo of the intended recompences; and theſe are things which were originally tied to thoſe Eſtates, and were incidents to them *ab initio*: And therefore this ſhall ſuffice to treat of bars to the Iſſues in tail by the Common Laws; and now I ſhall proceed to ſhew in what caſes they were barred of their Eſtates by the Statutes of this Realm.

44 *Ed.* 3. 20 *Ed.* 4. 46 *Ed.* 3.

12 *Ed.* 4.

By the Statute of 16 *R.* 2. *cap.* 5. The Lands and Tenements of one attaint in a Premunire are to be forfeited to the King; and in 21 *Eliz.* one *Trudgin* was Tenant in tail, and was attainted in a Premunire, and the queſtion was, Whether intailed Lands were forfeited againſt the Iſſues in tail, or not? And in Doctor *Forſter*'s Caſe in *Cook*'s 11th *Report*, it is there ſaid to be reſolved, that the general

16 *R.* 2.

21 *El.*

C. 11 *Rep.*

words

words of that Statute did not repeal the Statute of *Weſt-minſter* 2. of Intails, and ſo the forfeiture was there reſolved to continue but for the life of *Trudgin*, and did not bind the Iſſues in tail.

Weſtm. 2.

A judgment in debt againſt Tenant in tail, or if he be bound in a Statute or in a Recognizance in the nature of a Statute, the Lands intailed were not extendable, nor to be held in extent by the Statutes of *Weſtminſter* 2. *Acton Burnel*, or by the Statute *de Mercatoribus* by any of the general words of theſe Laws; but the Statute of 33 *H.* 8. *cap.* 39. by expreſs words bindeth the Heirs in tail, for their Lands whoſe Anceſtors ſtood indebted to the King by Judgment, Recognizance, Obligation or other ſpecialty.

Stat. Acton Burnel.
Stat. de Mercatoribus.
33 *H.* 8.

But the Statute of 26 *H.* 8. *cap.* 13. Enacts, *That every one which ſhall be attainted of Treaſon, ſhall forfeit the Lands whereof he is ſeized of any Eſtate of Inheritance*; and by this Statute intailed Lands were forfeited; and the words (*Of any Eſtate of Inheritance*) were the words which gave that forfeiture, the one in fee-ſimple, the other in fee-tail; and the word (*any*) preſuppoſeth more Eſtates of Inheritance than one.

26 *H.* 8.

But whether a decree of ſale of Lands made by Commiſſioners of Sewers ſhall bind the Heirs in tail, is the point of my caſe; and in my opinion I think they ſhall be barred, for the cauſes and reaſons following:

Firſt, The words of the Statute of Sewers be, *That ſuch a decree ſhall bind all and every Perſon and Perſons that at the making of the ſame decree had any intereſt in ſuch Lands, Tenements and Hereditaments in uſe, poſſeſſion, remainder or reverſion, their Heirs and Aſſigns:* So that by expreſs words it binds the Heirs; and it would have bound the Heirs of a Tenant in feeſimple, without the word (*Heirs*) expreſſed in the Statute; therefore the word (*Heirs*) needed not, but onely for the binding of the Heirs in tail.

Alſo if theſe Lands were charged by preſcription, as many Lands be, then were the Lands originally bound, and the Heirs in tail ſtand charged with theſe ſeſſes, as well as Land in fee-ſimple. And

And laſtly, This is a Law enacted for the preſervation of the Commonweal, and is more to be favoured than particular Eſtates of Heirs in tail: But the caſe of the Premunire was penal in point of a forfeiture, which is to be ſtrictly taken for the King, and favourably for the Subject; and therefore in my opinion, the Heirs in tail ſhall be bound in theſe caſes of ſale, and the rather becauſe they be within the words of the Statute, *videlicet*, Heirs generally put, which extends to Heirs in tail, as well as to Heirs in fee-ſimple; and becauſe the ſeſs and charge ſhall bind both alike, ſo in my opinion the ſale ſhall bind both, in regard the ſale depends upon the charge and ſeſs.

If a Prebend, Parſon or Vicar, Dean, Biſhop or ſuch like, which be ſeiſed of Lands in their politick capacity be ſeſſed to repairs of works of Sewers, their Lands cannot be decreed away from them in ſuch ſort as to bind their Succeſſours; for as this Statute of Sewers extends to bind Lands by decrees in perpetuity, ſo the Statutes of 1 and 13 and 14 *Eliz.* reſtrain Alienations, and where thoſe Statutes reſtrain them, I am of opinion, that this general Statute of Sewers doth not diſpence with thoſe Statutes. In *Croft* and *Howel's* Caſe in *Plow. Com.* a fine with Proclamations and non-claim by five years did bind the Corporation of the Myſtery of the Cooks in *London* for their right in Lands, and ſo all other Corporations which are abſolute of themſelves, and needed not the aſſent of any other, as Majors and Commonalties, Deans and Chapters, Maſter and Fellows of Colleges: but the Law is otherwiſe of Parſons, Vicars, Prebends, and ſuch like; And the like expoſition do I make of them in this Statute of Sewers. But I will here make a diſtinction; I am notwithſtanding of opinion, That the Parſons, Vicars, Prebends, and ſuch like, for their own neglect, are bound during their times, but not their Succeſſours after them; And note, this Statute though it mention Heirs, yet it doth not at all mention Succeſſours, which is worthy of conſideration alſo: And in my opinion this Statute as to decrees to be made of Lands will bind Women

1, 13 & 14 *El.*

Croft and *Howel's* Caſe.

Covert-baron, Infants, Perſons that be *non ſanæ mentis*, and ſuch like, becauſe it is a Law made for the ſafety of the Commonwealth: And ſo it is held in *Zouch*'s Caſe in the *Com.* That the Statute of 4 *H.* 7. of Fines had bound Infants, Idiots and Women Covert-baron, had they not been excepted in that Statute; *A fortiori* ſhall they be compriſed in this Statute, for the Statute of fines was made for the peace of the Weal-publick, but the Statute of Sewers was made for the ſafety thereof.

Zouch's Caſe. 4 *H.* 7.

If there be two Tenants in Common which be ſeſſed towards the repairs of a Wall, Bank or ſuch like work of Sewers, and one of them do neglect to pay his proportionable part, Whether Commiſſioners may decree a moiety without partition both of the ſeſs and Land, is a queſtion; for their Eſtates are ſeveral, though there be a community in taking of the profits: And therefore the matter is, whether the aſſeſs ſhall attend upon the poſſeſſion which is in Common, or upon their Eſtates which be ſeveral: And although Commiſſioners in aſſeſs be not bound to take notice of their Eſtate, yet if they take upon them to decree a Man's Lands from him, they are then to take notice of his Eſtate, and of all other circumſtances neceſſarily depending thereupon: In 22 *H.* 6. *fol.* 12. if a treſpaſs be done upon Lands which are held in Common, they are to join in an Action, but if one of them die that Action ſhall ſurvive, for though they were joint in the perſonalty, yet they diſjoined in the realty.

22 *H.* 6.

If the treſpaſs or wrong be done to the Land by ploughing, removing a Boundary, *&c.* both the Tenants in Common ſhall join in the Action, and that is becauſe the one hath as great wrong as the other; But if the Beaſts of one Tenant in Common be diſtrained or chaſed, he onely ſhall have the Action; *Latch.* 152. *Jones* 142.

Latch. 152. *Jones* 142.

My

My Lord *Coke* 1 *Inſt.* 198. *a.* gives the ſame reaſon why the Action ſhall ſurvive, as was intended here by our Reader, *ſcil.* becauſe albeit the property or Eſtate be ſeveral between Tenants in Common, yet the perſonal Action is joint, and every perſonal Action ſhall ſurvive: But the words here are tranſpoſed; For whereas it's ſaid, (though they were joint in the perſonalty, yet they disjoined in the realty;) it ſhould have been, (though they disjoined in the realty, yet they were joint in the perſonalty:) For the onely reaſon that could be given why the Action ſhould not ſurvive, is becauſe they disjoined in the realty, and upon this ground it was urged by *Danby* in the aboveſaid Caſe of 22 *H.* 6. that if treſpaſs were done in the Land, and one Tenant in Common dies, the Survivor ſhould not have an Action of Treſpaſs of the entierty. But the Court overruled him therein; and the reaſon is becauſe they were joint in the perſonalty, and therefore the Action ſhall ſurvive; and not becauſe they disjoined in the realty.

If two Tenants in Common of Land join in a grant of ten pounds rent-charge out of their Lands, the Grantee ſhall have ten pounds yearly of either by the opinion of Mr. *Perkins*; and of *Coke* 1 *Inſt.* 197. *a.* for that every man's grant ſhall be taken moſt ſtrongly againſt himſelf, and therefore they are ſeveral grants in Law. But if a ſeſs of ten pounds be laid and impoſed upon them by this Law of Sewers, this ſeſs 1 *Inſt.* 197. *a.*

ſhall not double as the rent ſhould; yet in this caſe of a joint aſſeſs impoſed upon Tenants in Common, and one would pay his moiety, and his Companion refuſeth, the Commiſſioners of Sewers cannot ſell a moiety of the Land, for that it is a joint ſeſs, and was not impoſed by moieties, and the ſale doth depend upon the ſeſs, and all may not be ſold; for that one Tenant in Common cannot prejudice his Companion in things of realty.

4. The fourth matter is to whom Lands may be decreed by this Law; for by the words of the Statute it appeareth, That the Commiſſioners have power to decree Lands for default of payment for years, for life, in tail, or in fee-ſimple; whereby the Law intended they ſhould make their decrees for ſale, according to the quantity of the ſeſs, and ſo ſhould uſe moderation in the Eſtates they made or ſold therefore; and it was not intended they ſhould ſell the fee-ſimple away for ſeſs which might be ſatisfied with the making of a leſs Eſtate.

And I am of opinion, that this decree doth make the Eſtate, with the help of this Statute, according to the limitation which ſhould therein be declared, and that the Party ſhall have Eſtate according as the ſame is thereby limited unto him; and this is no equitable decree which binds the Perſon onely, as Chancery decrees be, but it binds the Land, and therefore the Commiſſioners may not decree Lands to a Corporation, as to a Major and Commonalty, Dean and Chapter or ſuch like, which be Mortmain, for the general words of this Statute do not repeal the Statute of Mortmain in my opinion.

And herein I ſhall end my Argument touching Decrees; and I take it, though the intereſt of *E.* was intail, yet the ſale thereof might be made by this Statute for the cauſes and reaſons aforeſaid: And now onely remains under my cenſure to declare my opinion, whether the Commiſſioners of Sewers did juſtice, in refuſing to admit of Pleas of diſcharge which were tendred to them by *A.* and *E.* wherein may come juſtly into our conſiderations theſe things, (*viz.*)

Whether

Whether Traverſes, Pleas of Exemptions, and other legal proceedings, may be had in this Court of Sewers, or not; ſaving I add this, that theſe decrees of ſale being binding, muſt be certified into the Chancery, with the King's Royal Aſſent had thereto.

Legal proceedings.

Traverſe.

TO enter into theſe parts of my Law, I think it fit to begin with *Traverſe*, and to deliver my Opinion, whether ſuch pleas and proceedings are to be admitted into this Court; for a Traverſe is a Plea of the party containing matter to the contrary of that that the party ſtands accuſed of, or which is laid to his charge: And in ſome caſes our Books and authorities of Law admit the party to a Traverſe, and in other Caſes the ſame is to be denied; for in 5 *H.* 7. *fol.* 9. *&* 45 *Ed.* 3. *fol.* 8. *&* 28 *H.* 8. in D*yer*, *fol.* 13. if one be preſented in a Leet Court for a Blowipe or any other perſonal wrong, this Preſentment is not Traverſable, but the party is without remedy therein, though the Preſentment be falſe and the matter of it untrue; and the Law is ſo alſo of ſuch a Preſentment made in a Sheriff's Turn: and herewithall agreeth the Books of 2 *R.* 3. 11. *&* 19 *H.* 8. 11. *Fitz. Aſſiz. plac.* 442. *&* 8 *Ed.* 4. 5. and the reaſon thereof is delivered in 5 *H.* 7. becauſe no Proceſs is there awardable againſt the party to call him to anſwer: Yet in the ſame Book of 5 *H.* 7. it is ſaid, *That if a Preſentment be made which toucheth a mans Freehold, he may there Traverſe the ſame.* But I take it the party muſt firſt remove the Preſentment into the King's Bench, and there Traverſe it; for in the Court Leet, in my Opinion, there can be no Traverſe taken or tried, no more where the Preſentment toucheth Freehold, than where it onely concerneth a perſonal wrong: Therefore the reaſon alledged in 5 *H.* 7. cannot be the

5 *H.* 7.
45 *Ed.* 3.
28 *H.* 8.
2 *R.* 3.
19 *H.* 8.
5 *H.* 7.
8 *Ed.* 4.

the true cauſe wherefore in perſonal wrongs the Preſentments cannot be traverſed; but the very true reaſon therein is, as I take it, becauſe theſe petty Preſentments be of ſuch petty trifling matters, that in avoidance of trouble the Law eſteemed them not worthy of Traverſe and Trial; and Juſtice *Fairfax* in 5 *H.* 7. is of opinion, *That a Preſentment made before Juſtices of Peace in a Seſſions is traverſable:* and with this agreeth *Stanford*, *fo.* 183. and in other Courts of Law there oftentimes fall out matters which one ſhall not be admitted to take a Traverſe unto, and in ſome other caſes he ſhall, as by theſe ſucceeding authorities may appear. In the 37 *Aſſiz. plac.* 7. a Preſentment was taken before *Green* and *Ingham*, Juſtices of the King's Bench, That *J. S.* who had killed *A.* had goods to the value of Eighty pounds in the hands of one *John Lombard*; and upon the Preſentment a *Scire facias* was awarded againſt *John Lombard*, to ſhew cauſe wherefore theſe goods ſhould not be ſeized to the King's uſe: *John Lombard* came in and tendred a Plea to the Preſentment, that theſe goods were not the Felons, but that they were delivered to him to keep to the uſe of a Cardinal of *Rome*, and he was there admitted to this Plea; and with this agreeth 45 *Ed.* 3. *fol.* 26. expreſly: Yet in that book and Mr. *Stanford*, *fol.* 183. it is holden for Law That if it be preſented before a Coroner that *J. S.* killed *A. B.* and fled for the ſame fact, and after upon his trial he is acquit, yet he ſhall forfeit his goods upon the *Fugam fecit* before the Coroner, and he ſhall not be received to take any Traverſe to the ſaid Preſentment in that Point. The difference in which two caſes is this in my opinion, that a ſtranger, as *John Lombard* was, in the firſt caſe, ſhall not be peremptorily concluded; for it were no reaſon one man's goods ſhould be forfeited in another man's default, and he ſhould have no anſwer thereunto: But in the other caſe, in Terror of Felons, though he be acquitted of the Felony, yet he is not acquitted of the flying, and he may be guilty notwithſtanding his acquittal. There be other caſes in the Law which admit no Traverſe, as in *James Bag's* caſe

Stanford 183.

45 *Ed.* 3.

James Bag's Caſe.

Cook

Cook 11 *Rep.* where a Writ was directed to the Major and Burgeſſes of *Plymouth* to reſtore *Bag* to his Aldermans place there, which they had put him from, and they return a cauſe ſufficient to bar him, which notwithſtanding is falſe; yet he ſhall not be received to his Traverſe therein; neither could a Traverſe be admitted to the Certificate of the Biſhop, wherein was contained, that *J. A.* Parſon of *Dale* had refuſed to pay his diſmes to the King, by means whereof the Parſon loſt his benefice, which caſe is in *Br.* caſes, *temp. H.* 8. *pl.* 332. and *Dyer*, *fol.* 116. and 7 *H.* 4. *fol.* 4. and 21 *H.* 7. 8. and many other Books be, that no Averments ſhall be taken to the returns of Sheriffs to take any Iſſue thereupon.

Br. Caſes. *Dyer* 116. 7 *H.* 4. 21 *H.* 7.

And in Dr. *Bonham's* Caſe upon a *Habeas corpus*, the Phyſicians returned the cauſe of his impriſonment, which was falſe; yet he could not be admitted to Traverſe the ſame. But yet by the opinion of theſe Books, an Action upon the caſe lieth againſt the Major and Aldermen, and againſt the Biſhop, for their certificates, and againſt the Sheriff for their falſe returns; and if Juſtifications be made by them they may be traverſed: But theſe will not reduce the parties to their former liberties (*viz.*) not the Alderman to his place, nor the Parſon to his Church, but damages in thoſe caſes are onely recoverable.

Dr. *Bonham's* Caſe.

Theſe caſes I have put as Reaſons and Arguments againſt our caſe of Sewers; But yet I am of opinion, that a Traverſe may be taken to a Preſentment made in this Court of Sewers, and herein this Court may be reſembled to a Seſſions of the peace: And this Commiſſion of Sewers gives the Commiſſioners of Sewers power to hear and to determine at the King's ſuit, as well as at the ſuit of the party; and a Traverſe lieth of a Preſentment found before Commiſſioners of *Oyer* and *Terminer*, and is triable before them by the Books of 29 *Aſſiz. pl.* 33. and 12 *Lib. Aſſiz. pl.* 21. and the Earl of *Leiceſter's* caſe in *Plow. Com. fol.* 397. and the words of this Statute are ſufficient to yield the party the benefit of a Traverſe if there be cauſe; and for preſident in the

29 *Aſſiz.* 12 *Aſſiz.* *Com.*

Rom. Marsh. the point, Charter of *Romney Marsh*, *pag.* 23, and 24. one *Godfrey* being presented that he ought to repair a Bank or Wall, and that he did neglect to do the same, and he came in and pleaded a Plea thereto before the said Commissioners,

19 *Assiz.* and in 19 *Lib. Assiz. plac.* 6. there were divers Presentments before Commissioners of *Oyer* and *Terminer* for Nusances done in the River of *Lee*, and the same were there traver-

1 *H.* 4. sed and tryed: And the Statute of 1 *H.* 4. *Chap.* 12. doth plainly admit of a Traverse, wherein the words be, *That in case if any feel himself grieved by execution or otherwise against right and reason, let him pursue and he shall have right:* But I verily suppose, that those things which the Justices of Sewers do by their view, or by survey and discretion, are so binding that in those cases no Traverses are to be admitted, because these things are merely the acts of the Court, and of the Justices themselves: and if they fine a man for his contempt in Court by a Record of their own view, and not upon a Presentment, the party shall not be

Dr. *Bonham's* Case. received to Traverse this: and in Doctor *Bonham's* case it is said, *That the act of a Judge is not Traversable, if he be the absolute Judge of the Cause; But in cases done or certified by such as be no absolute Judges of the Cause, as Commissioners of Bankrupts, which certifie one a Bankrupt, he may Traverse this in an action brought*, as was done in the case of *Cut* and *Delaber* in 7 *Jac.* in the common place, and *Vernie's* Case 1 *Mar Dyer fol.* 89. no Averment could be taken to the certificate of a Judge; and with this agreeth 7 *H.* 7. *fol.* 4.

Cut and *Delaber.* 7 *Jac.* 1 *Mar.* *Dyer* 89. 7 *H.* 7.

But although a Traverse may be taken to a Presentment in the Court of Sewers, yet times and seasons must be observed; for if a Presentment be there made, it may be Traversed for the reasons, causes and presidents formerly mentioned; Yet if the cause have been there so far proceeded in as the Commissioners make a decree thereupon, I take it then no Traverse at all can be taken, because a decree is the final Judgment of the Court, and is an act Judicial which cannot be traversed and tryed by a Jury, for that were to re-

fer

fer the Judgment of the Court to be examined by a Jury, which may not be admitted; and at the Commonlaw, after Judgment no Traverſe can be taken: And if one be indicted at the general Seſſions of the Peace, this is traverſable; but if the party ſuffer himſelf to be outlawed upon the ſaid Indictment there, no Traverſe lieth, but a Writ of Error: So if in our Seſſions of the Sewers, the cauſe proceed to a decree, the party grieved is to take his way by preferring a Bill of Reverſal in manner as is done in the High-court of Chancery, and ſo he may have the cauſe here throughly examined.

Other Legal Proceedings.

THE words of the Statute which give the legal proceedings be theſe (*viz.*) *That the Commiſſioners of Sewers may hear and determine all and ſingular the Premiſſes, as well at our ſuit, as at the ſuit of any other complaining before them, after the Laws and Cuſtoms aforeſaid, or otherwiſe, by any other ways or means*; theſe words give the party remedy to ſue before the Juſtices of Sewers for ſuch things as are contained within theſe Laws, and which have their dependency thereon: In *Colſhil*'s caſe in *Dyer*, *fo.* 175. the party preferred his Bill of complaint to the Commiſſioners, containing the effect of his Title to the Office in queſtion, and theſe were ſpecial Commiſſioners of *Oyer* and *Terminer*: Juſtices of the general *Oyer* and *Terminer*, may hear and determine Uſury by the Statute of 13 *El. cap.* 8. yet if *J. S.* be bound in a Bond of Ten pounds principal debt, and for Forty Shillings for Intereſt, although this Bond be for payment for uſury, yet an Action of Debt doth not lie thereupon before the ſaid Commiſſioners, but an Imformation may be preferred againſt the Lender there to puniſh him.

Colſhil's Caſe.

13 *Eliz.* c. 8.

So by our Statute of Sewers an Action of Treſpaſs lieth not for a Treſpaſs done within the reach of this Commiſſion; yet *Diſtinguendum eſt*; for put the caſe a Seſs is laid upon a man, and the goods of *J. S.* not chargeable thereto

be taken and diſtrained, who is not chargeable to the payment thereof, *J. S.* in my opinion (though this caſe have but the Countenance of this Commiſſion) may have his Action or prefer his complaint before the Commiſſioners in this Court of Sewers for the recovery of his damages: And although this be but a private Action, yet the diſtreſs being taken by an authority drawn from the power of this Commiſſion, the party diſtrained may have his remedy in this Court by his private Action, becauſe it ſprung by the colour of the general power of this Court.

If *A. B.* have a ſeveral Piſcary in the River of *Witham*, which is a River within the Commiſſion of Sewers, and the ſaid Piſcary by theſe Laws is chargeable to the repairs thereof, if *C. D.* diſſeize him thereof, or commit a Treſpaſs by fiſhing therein, *A. B.* can neither have an Aſſize nor Action of Treſpaſs within this Court.

So if a Royal or Common River hath his current through the Town of *Dale*, and one *A. B.* is tied to repair the Banks there by Tenure, Preſcription or otherwiſe, which notwithſtanding in his default are broken down, and the Waters breaking out overflow the grounds of *C. D.* thereto adjoining, yet *C. D.* hath not any remedy to recover his damages againſt *A. B.* in this Court for the loſs of his grounds, but he is put to his private Action therefore at the Commonlaw; and with this agreeth the caſe of *Keighley*: But if *A. B.* be preſented therefore before our Commiſſioners of Sewers, they may order *A. B.* to repair the breach, but cannot award damages to *C. D.* for our Commiſſioners of Sewers are herein like to Juſtices of Peace, and to Stewards of Leets and Law-days, which have power originally to meddle onely with the publick wrong; Yet by the power of their Commiſſion, and of this Statute, they many times accidentally meet with private injuries, as by the inſuing caſes may appear.

Keighley's Caſe.

If a Townſhip be aſſeſſed by a Law of Sewers, and the goods of one of the Inhabitants be taken for the ſeſs, that party upon his complaint to theſe Juſtices of Sewers may have

have proceſs out of this Court to call before them the reſt of the Inhabitants which were ſubject to the ſaid ſeſs, to cauſe them to contribute towards the party's damage who was ſolely diſtrained for them all, for otherwiſe this Court ſhould fail of juſtice in his own proper materials, and the Statute of 1 *H.* 4. *c.* 12. ſaith, *That he which is grieved, let him have remedy:* And if the goods of a man taken for his tax or ſeſs be ſold for the payment thereof, for more moneys than his ſeſs came to, the Juſtices of Sewers have power to cauſe the Officer to reſtore the overplus, *Et cum hoc concordat* the Charter of *Romney Marſh.* 1 *H.* 4.

If the Commiſſioners of Sewers appoint the Officers to take ſo many Trees of *J. S.* at ſuch a price, for the repairing of a defence againſt the Sea, or to make a Trench over the grounds of *J. D.* and thereto erect ſomething toward theſe Actions, *J. S.* hath remedy to come by his moneys in this Court, and the other party over whoſe grounds this Trench is made, may be relieved in recompence to be made to him for the hurt in his grounds.

If Laborers or Workmen, as Carpenters, Maſons, Smiths, Dikers, or other perſons be ſet on work by the power of theſe Laws, they may by the ſame power recover their Wages before the Juſtices of Sewers; for the original cauſe ſprung out of the power of this Commiſſion, and this is there determinable, as incident to the authority of that Court: But if the original cauſe did not ariſe out of this Commiſſion, as in ſome of the preceding caſes they did not, then hath this Court no Juriſdiction of the matters depending thereon: And I do ground this diverſity upon the reaſon of the Book-caſe put in 1 *R.* 3. *fol.* 4. where it is ſaid, *That if the original cauſe do belong to the Court Chriſtian, although in the proceedings therein ſome matters happen which depend on the principal, which do belong to the Temporal Court,* Yet *Acceſſarium ſequitur ſuum principale,* and theſe matters ſhall alſo be determined in the Court Chriſtian: And ſo if in a cauſe at the Temporal Law, as in a *Quare impedit,* and in the proceeding therein, ſome matter do a- 1 *R.* 3.

riſe depending on the principal cauſe, which belongeth to the Court Chriſtian, yet the Temporal Court ſhall continue his Juriſdiction thereof: And with this diverſity agreeth *Kelleway's Report*, *fol.* 110. ſo in our Court of Sewers, although a thing happen in the proceedings, which if it ſtood merely of it ſelf would not pertain *ad eor' examen*, notwithſtanding if it be but a matter accidental, and have his dependance upon a principal matter which is determinable in this Court, the other alſo ſhall be here determinable.

Kelewayʼs Rep.

Juſtification by the Commiſſioners and Officers of Sewers.

IF a man be ſued for diſtraining Cattel or other Goods, or doing any other Act by vertue of the Commiſſion of Sewers, this Statute of 23 *H.* 8. *cap.* 5. hath provided, That the Defendant may juſtify by alledging in his Plea, that the ſaid diſtreſs or other act was done by authority of the Commiſſion of Sewers for lot or tax aſſeſſed by the ſaid Commiſſion, or for ſuch other act or cauſe, as the ſaid Defendant did by authority of the ſaid Commiſſion, and according to the Tenor, purport and effect of the ſaid Act; without any reherſal of any other matter contained in the ſaid Act, or any Commiſſion, Statutes or Ordinances thereupon made, whereupon the Plaintiff ſhall be admitted to reply, that the Defendant did take the ſaid diſtreſs, or did the ſaid Act of his own wrong, without any ſuch cauſe alledged by the ſaid Defendant;

fendant; whereupon Iſſue ſhall be joined, and upon the trial, the whole matter ſhall be given on both parts in evidence, according to the truth of the ſame: which is a beneficial clauſe for ſuch as act under the authority of the Commiſſion of Sewers, and exempts them from pleading all the ſpecial matter, which would be tedious, chargeable and dangerous.

Whitley brings an Action of Trover and Converſion againſt *Fawſett* for taking his Cattel, by way of diſtreſs, and ſelling them by vertue of a Warrant of Commiſſioners of Sewers, for not paying of a Tax ſet by them towards the reparation of Sea-walls; the Defendant waves the benefit which this Act had given him, and pleads all the ſpecial matter; the Plaintiff demurs to this Plea, and it was reſolved, that ſeeing the Defendant had waved his benefit of the Plea, given him by the Statute, by pleading ſpecially, he ought to make good his Plea, as he hath pleaded it, at his own peril: And the Plea was adjudg'd to be ill, for ſeveral defects, which had been avoided, if the Defendant had pleaded as the Statute directed him; *Style* 12, 13. *Style* 12, 13.

In treſpaſs *B. R.* 2 *Car.* 1. for taking of Bullocks, the Defendant pleads that King *James* granted to divers Perſons a Commiſſion of Sewers, to endure ten years, and juſtifies the taking for a fine impoſed by the Commiſſioners,

ners, but ſhews not whether it was in the time of King *James*, or of King *Charles*; and it was reſolved by the Court, that he ought to have ſet forth the time; for the Statute of 23 *H.* 8. 5. is intended onely of circumſtances, but here the time is matter of ſubſtance; Addition to *Benlowes* 199.

Addition to *Benlowes* 199.

Exemptions.

IT may be a grand queſtion, Whether theſe Laws of Sewers will permit any Exemptions to any perſon or perſons, and by the ſtrict penning of the words of this Commiſſion it ſeems to oppoſe all ſuch privileges and diſcharges, as Exemptions be; The ancient Commiſſion which is in the Regiſter, and in *Fitz. Nat. Br.* are exceeding ſtrict; for the words therein be, *Ita quod aliquibus tenentibus terrarum ſeu Tenementum ſeu communiam paſturæ ſeu Piſcariæ habentibus diviti vel pauperi vel alteri cujuſcunque fuerit conditionis Status aut dignitatis qui defenſion' habere potuerint per predict' Wallias Gutturas Foſſata ſueras pontes calceta & gurgites ſeu etiam damnum per trencheas predict' ſuſtinent vel poterint ſuſtinere ſive fuerint infra libertates ſivè extra non parcantur in hac parte*; And the words in our Statute be in effect, *And all ſuch which reap profit or ſuſtain damage, ſhall be aſſeſſed*; which words ſeem not to admit of diſcharges: Yet in my opinion out of the ſtrict words of theſe Commiſſions there be ſome Exemptions, though not expreſſed in words, yet ſupplied in reaſon, and are to be added in conſtruction.

Regiſter. *Fitz. N. B.*

1. Firſt, For the grounds lying betwixt the Sea-banks and the Seas are in reaſon exempted from the charge of the Banks and Walls, becauſe they can take no ſafety thereby.

2. Secondly, Thoſe grounds which be upon an aſcent, and not on the Level, are alſo by the rule of reaſon exempted

ted from aſſeſſes to be impoſed onely by the power of theſe Laws.

Thirdly, Where one or more be tied to repair a Bank, Wall or other Defence by Cuſtome, Preſcription, Tenure or otherwiſe, all others be in Law and reaſon exempted. 3.

Fourthly, A Parſon and Vicar with Cure are not to be aſſeſſed for their Tythes, and divers of the Hereditaments formerly mentioned in Aſſeſſes be by the rule of reaſon exempted. 4.

Fifthly, But whether one may be diſcharged and exempted from the repairs of the works of Sewers by any ſpecial Cuſtome or Preſcription, is a great queſtion of our caſe, in regard both the old and new Commiſſions *Quod nullus in hac parte parcatur* ſeem to toll all Preſcriptions and Cuſtoms of diſcharge, and to admit of none of them: And the Charter of *Romney Marſh*, *pag.* 31, 32, and 33. beareth the ſame Expoſition; for there *Godfrey* pleaded a Plea to diſcharge him of the repairs of the Walls and Watergauges, becauſe he claims his Lands by Charter from the King, and alſo preſcribed generally *in non reparando*, but he durſt not abide his Plea; for there *pag.* 39. it is ſaid, *That all having Lands ſhould contribute, and that none might be ſpared*; and alſo *pag.* 53. be theſe words, *Quod ſtarent ordinationi Jurator' predictor' nulla conſuetudine reſiſtente*; which words be direct in the point againſt ſuch general diſcharges claimed by blind cuſtoms: Yet I have been credibly informed, that Sir *George Fitzwilliams* Knight, had a Cuſtome in his Town and Manor of *Mabblethorp* in the County of *Lincoln*, called *Swiftage*, whereby he challenged to be freed from being charged to the repairs of the Sea-banks, becauſe in conſideration thereof he and his Anceſtors have uſed in regard of their Manor there to do ſome other repairs as beneficial for the Commonwealth; and in my opinion, in ſuch a ſpecial Cuſtome one may be exempted; like to the caſe of Tithes, wherein one could not by the Common Laws preſcribe in a *non decimando*, yet in a 5. Ch. *Romney Marſh.*

modus

modus decimandi he may, becauſe there is ſome competent conſideration given in lieu thereof; And ſo in my opinion one cannot generally preſcribe or alledge a cuſtome to be freed and clearly exempted from the repairs of Sewers, but by ſpecial cuſtome he may, as in the ſaid Caſe of Sir *George Fitzwilliams*.

The Lands of the King are not exempted from being taxed by virtue of the Commiſſion of Sewers; and therefore in the Caſe of *Whitley* and *Fawſet*, *Paſch.* 23 *Car.* 1. *B. R.* where it appeared, that there were 800 Acres of Land in the hands of the King, which were not taxed, as by Law they ought: it was held that the tax laid upon the other perſons within the Level was unjuſt and illegal, becauſe by the not taxing of thoſe 800 Acres, a greater burthen was laid upon the reſt of the Land within the Level, than of right ought to be, for that the King's Lands are taxable by the Statute, *Style* 13. *Style* 13.

And therefore the Commiſſioners of Sewers in my Caſe did very juſtly and diſcreetly refuſe the ſaid general Pleas of diſcharge tendred to them by *A.* and *E.* and ſo I *ſuper totam materiam* conclude my Argument as I did my Caſe, That the Commiſſioners of Sewers did adminiſter true Juſtice in all the parts of theſe Laws.

Finis hujus Tertiæ Lectuæ.

Lectura

Lectura Quarta.

IT appeareth by this Statute I read on, that the Law-makers made it not the leaſt part of their care to have ſuch perſons put in truſt with the execution thereof, as ſhould be of great wiſedom and approved experience. And becauſe that perſons of profound wiſedoms, deep experience, tried Learning, generous Diſpoſition, and of good Eſtate, ſhould be put into theſe Commiſſions of Sewers, the Statute did make choice of four Honorable perſons to have and take the nomination of ſuch as ſhould for their Integrity, Learning, Wealth, Wiſedom and Experience, be worthy to be put into this Commiſſion. And therefore the Lord Chancellour, Lord Treaſurer, and the two Lord chief Juſtices for the time being, have by this Statute the nomination of our Commiſſioners; But as theſe great perſons of Honor by their high places are moſt commonly buſied in matters of great importance, they many times refer theſe matters to others, by means whereof divers perſons in ſome Countreys have of late years crept into Commiſſion, which this Statute doth not allow of, which do not onely want knowledge and experience, but which are alſo tranſported and carried away with ſelfwill, and ſerve moſt commonly to make a faction of the greater number to carry away buſineſſes, when the graver and wiſer ſort are forced (being overladen with popular voices) to give way to run into contrary courſes, and are made to ſurceaſe from making good and wholſome Laws and Ordinances, and ſometimes are as it were forced to agree to thoſe which are worſe; even as the Roman Dictator *Fabius* having joined to him the froward *Minutius*, was by the violent ſtream of his Collegue ſo croſſed and over-

 ſwayed,

ſwayed, not out of judgment, but ſelfwill, that he was forced to give way to *Minutius*'s frowardneſs, though it tended almoſt to the hazard and the overthrow of the whole Roman Army: And becauſe the Commiſſioners are the perſons through whoſe hands the execution of all theſe Laws muſt paſs, I thought it therefore very convenient to take into examination theſe parts of the Statute which touch and concern them: And I intend to purge the Commiſſion of ſuch of them as theſe Laws have diſallowed, and to that purpoſe I have framed this inſuing caſe, which I take it will give us occaſion to call them all into queſtion and to ſever the juſt from the unjuſt, the ſufficient from the unſufficient, and the learned from the illiterate.

The Caſe.

A. Demiſeth to *B.* and *C.* Land of the yearly value of Sixty Pounds *cum ſtauro* of the value of Two Hundred Pounds for their lives, the Remainder to *D.* a free Citizen of *Lincoln*, *B.* and *D.* diſſeiſe *C.* of the Land and take the ſtock, *C.* releaſeth to *D.* the goods abſolutely, and the Land upon Condition; *D.* dieth in Exile, *E.* his ſon and heir enters, *B.* and *C.* who enter for the Condition broken, *E.* and *Francis* Counteſs Dowager of *Warwick* and three other Commiſſioners of the *Quorum* of Sewers, make a Law to raiſe a Were, erected upon a River navigable at the coſts of the party, becauſe it hindred the current of Waters.

My Concluſion is, That here be competent Commiſſioners in number and in Eſtate which made this Law, and that this Law is well decreed within this Statute.

The caſe I do diſtribute into theſe points, *viz.* Three at the Commonlaw, and four upon this Statute; the points I intend by the Commonlaw are theſe:

1. Firſt, Whether the Sixty Pounds ſtock can be demiſed and letten for life, with the Remainder over, as this caſe is.

Secondly,

Secondly, Whereas *B.* and *C.* be two jointenants in poſ- 2.
ſeſſion, whether one of the Jointenants and a Stranger can ſo diſſeiſe the other Jointenant as to transfer thereby an intereſt and Eſtate to the Stranger.

Thirdly, Becauſe the Releaſe dependeth upon the diſ- 3.
ſeiſin, the queſtion is, in what manner it doth innure, and whether it ſhall expell *B.* out of that moiety, becauſe it is made to the Stranger; and then what is reduced by the condition, whether a poſſeſſion, action, or a right.

Points upon this Statute.

Firſt, Whether the Son of the free Citizen exiled is a 1.
diſabled Commiſſioner, in reſpect of his Perſon; and whether he hath ſuch an Eſtate, either in Lands or Goods, as will ſatisfy this Law.

Secondly, Whether the Counteſs may be a competent 2.
Commiſſioner within this Statute.

Thirdly, Whether a joint intereſt in Lands or Goods 3.
will make the Jointenant a ſufficient inabled Commiſſioner within this Statute.

Fourthly, Whether the Were, as this caſe is, be raced 4.
down or not.

And hereupon I intend to lay open the whole diviſion, touching the Lets, Impediments and Annoyances which this Statute ſpeaketh of.

Argumentum Lectoris.

I meant it not for a point in this Caſe, whether Goods might be let with Land, nor whether a ſtock might be leaſed with a Farm, becauſe I find the Books of 1 *H.* 6. 1. 1 *H.* 6. 1.
and many others full in the point that they may. And although by the taking of them back again by the Leſſor, they will thereby ſuſpend no rent, yet in the original demiſe they may be a cauſe to increaſe the rent: but my point herein is double.

Firſt, Whether they will paſs in remainder, as my Caſe 1.
doth limit them.

Secondly, Whether they will inable *B.* and *C.* to be 2.
Commiſſioners of Sewers allowed by this Statute.

I do not onely find ſtock let with Farms, but alſo joined in real Actions with Land : for in the Writ of Aſſize the words be, *Quod vicecomes faciat Tenement' illud reſeiſiri de catallis quæ in ipſo capta fuerint & ipſum Tenement' cum catallis eſſe in pace uſque, &c.* Theſe doubtleſs were ſuch Goods as ſtocked the Grounds, and which uſually went with the ſame, for in ancient times when any farmed Grounds, they uſually farmed the ſtock thereon going, and this appears by ancient preſidents ; *Sed nunc aliud tempus.*

In the Writ of *Ejectione firmæ* in the Regiſter be contained theſe words, *Oſtenſum quare vi & armis manerium de Dale quod* C. *prefat'* A. *dimiſit ad terminum qui nondum preteriit intravit & bona & catalla ejuſdem* A. *ad valentiam, &c. in eodem manerio inventa cepit & aſportavit.* So that in thoſe Writs of Aſſize and *Ejectione firmæ*, the one to recover the Freehold, the other the Leaſehold : We find Goods which went with the Manor or Farm made parcel of the plaint ; and I take it, damages ſhall be increaſed therefore ; for theſe were ſuch Goods as ſtockt the Farms. And in *Wrotſly* and *Adams*'s Caſe in *Plo. Com.* Exception was taken in abatement of the Writ, becauſe the words (*bona & catalla*) were left out of the ſame : Yet in my opinion, no Eſtate, neither *in preſenti* nor in remainder can be made of Goods or Chattels, neither ſhall they go with the Land in point of Eſtate, but ſhall paſs to the Leſſee, and after to him in the remainder, as a dependancy upon the Farm : And the Heir ſhall have Heir-looms, together with the Manſion-houſe, as things neceſſarily concurrent therewithall, yet the Heir-looms have no deſcending qualities, but they do go with land wait upon the Houſe, as neceſſary Inſtruments fitting to be uſed therewith ; neither can it be gathered by the Book of 37 *H. 6. fol.* 30. that the Book called *The Grail* (which was deviſed by will to *A.* one of the Executors to have the occupation during his life, the remainder thereof in like manner to *B.* for his life, and after to be diſpoſed by the Executors to the Churchwardens

Wrotſley and *Adams*'s Caſe.

37 *H. 6.*

wardens of *Dale*) that it did pass to *A.* and *B.* in point of Estate, but onely the use and occupation thereof was disposed to be ruled according to the said Limitations, but the property remained in the Executors.

And a devise of such use and occupation of goods in remainder, was, *Trin.* 17 *Car.* 1. *C. B.* adjudged to be good; but otherwise it is of a devise of the Goods themselves in remainder, for such devise is void; *March* 106. *Roll abr. tit. Devise*, 610. *March* 106. *Roll abr.* 610.

It was adjudged, *Mich.* 28 & 29 *Eliz. C. B.* that where a stock of Sheep was leased by Indenture, the property of them still remained in the Lessor; *Godbolt* 113. *Godbolt.* 113.

So in *Paramore* and *Yardley's* Case in the *Com.* and in *Matthew Manning's* Case in *Cook's Reports*, a Term of years could not be devised to *A.* for life, the remainder thereof to *B.* for his life, to pass in this manner in point of Estate; neither could these Estates be made thereof, but by construction the same was disposed of to go by way of executory devise; and so the stock in my Case was not transferred in point of Estate with the Land, but in point of executory disposition of the occupation and use thereof onely; and therefore if one let a stock of Cattel or Sheep with Grounds at the end of the term, the Goods as accessory with the Land as principal shall return to the Lessor, and during the term the Lessor hath the property of them, and the Lessee the possession thereof, and the Lessee shall have the yearly profits thereof for his Rent; and here I do end this first Point, and will proceed to the rest. *Paramore* and *Yardley's* Case. *Manning's* Case.

The second Point.

There be two Jointenants, and one of them and an Estranger do disseise the other; what interest the Stranger gaineth thereby is the question.

I am

I am clear of opinion, as many Books be, That one Jointenant may diſſeiſe his Companion by an expreſs *Ouſter*, but when a Stranger joineth therein, in what part that doth alter the caſe is the matter; for if the Stranger ſhould get a joint Eſtate in poſſeſſion with the Jointenant whom he joined withall, that were to make a double Jointenancy *in uno eodémque gradu:* for the Jointenant which committed the diſſeiſin, which hath the poſſeſſion, and the Jointenant which was diſſeiſed and which hath the right, do hold jointenancy ſtill; for by 36 *Ed.* 3. a right may hold jointenancy with a poſſeſſion, and the one may take by ſurvivor from the other, in 9 *H.* 7. *fol.* 23. That he in remainder and a Stranger may diſſeiſe Tenant for life, and ſhall be both Diſſeiſors; but in that caſe they were both Strangers to the particular Eſtate: Alſo it is manifeſt that one jointenancy may be built upon another, As if two Jointenants be diſſeiſed by other two Jointenants of the right *ſemel*, but not *ſimul:* But in our principal caſe, Whether one Jointenant might hold the poſſeſſion of a moiety with his firſt Companion in jointure, with his moiety in right, and can alſo *uno tempore* hold jointenancy in poſſeſſion with a Stranger, of the moiety upon which the diſſeiſin was committed, I ſuppoſe he cannot, becauſe then he ſhould hold partnerſhip with both of one thing: And therefore in my opinion the Stranger getteth nothing in my caſe, but is onely a Coadjutor, and no Diſſeiſor, which gets the Tenancy.

35 *Ed.* 3.

9 *H.* 7.

The third Point.

But admit the Stranger did get a moiety of a moiety by joining in the diſſeiſin, then what alteration this releaſe will work in my Caſe is the next queſtion.

Littleton.

It is true as Mr. *Littleton* ſaith, That if there be two Diſſeiſors, and the Diſſeiſee releaſe to one of them, he ſhall hold his Companion out of all, and by ſuch releaſe he ſhall have the ſole poſſeſſion and ſtate in the Land; The like Law is in my Caſe of two Abaters and two Intruders:

truders: but if two Diſſeiſors be, and they make a leaſe for years, rendring rent, and then the Diſſeiſee releaſeth to one of the Diſſeiſors; I ſuppoſe this releaſe ſhall inure to both, becauſe the Leſſee for years, whoſe Eſtate ſhall be ſtrengthned by this releaſe, is in by the title under both of them, and now they are Tenants of a reverſion onely, and of a rent thereto incident, which was not got by the diſſeiſin, but was compoſed by the legal contract of the Parties; But the reaſon given for this in *Co.* 1 *Inſt.* 276. *a.* is grounded upon the ſaid words of *Littleton*, that if two Diſſeiſors be, and the Diſſeiſee releaſe to one of them, he to whom the releaſe is made, ſhall have the ſole poſſeſſion and eſtate in the Land; which he cannot have, where the Diſſeiſors have made a leaſe for years, before the releaſe; for by the leaſe, part of the Eſtate is in another, and therefore (ſaith my Lord *Coke*) in ſuch caſe the releaſe to one of the Diſſeiſors ſhall enure to both; and though our Reader here puts the caſe of rent reſerved upon the leaſe for years, yet the reaſon given by *Coke*, will as well hold, where there is no rent reſerved. The like Law is, if the Diſſeiſors make a leaſe for life, and then the Diſſeiſee releaſes to one of them, this ſhall enure to them both, for the ſame reaſon, becauſe he cannot by the releaſe have the ſole Poſſeſſion and Eſtate, for part of the Eſtate is in another, 1 *Inſt.* 276. *a.* 1 *Inſt.* 276. *a.*

So if two be admitted to a Copyhold by Tort, or to an Office in a Court of Juſtice unlawfully, though their entry be unlawfull, yet becauſe they came in by admittance, which is at the door of Juſtice, I ſuppoſe therefore, that if a releaſe

a releaſe be made to one of them by the Diſſeiſee, it ſhall inure to both, becauſe they had ſome colour and countenance to enter, more than expreſs Diſſeiſors or Intruders have.

But if a Son and a Stranger diſſeiſe the Father, and after the Father dieth, and the right deſcend to the Son, by this releaſe in Law, and by the acceſſion of the right by deſcent to the tortious poſſeſſion, it doth inure onely to the Son; and although this releaſe was upon condition, which by the breach thereof ſeemeth to ſet the Releſſor in the ſame ſtate he was before, yet it doth not admit the Joint diſſeiſor which was expelled thereby to become a copartner again with his fellow: As if the Son and a ſtranger diſſeiſe the Father, and the Father dieth, the ſtranger hereby is expelled by the deſcent of this right to the Son; yet if after a more near Heir is born, as the Elder Brother died his Wife enſeint with a Son, which after the deceaſe of the Grandfather is born, whereby the Inheritance of this Land is his; yet the other Jointdiſſeiſor which was expelled by the deſcent of the right of his fellow diſſeiſor, by the departure of the right with the poſſeſſion, cannot enter upon his fellow diſſeiſor, in my opinion.

But now the queſtion is farther, what is reduced by this condition, the right onely which was releaſed, or the poſſeſſion together with this right; for if but a right be reduced, then a deſcent hapning may perchance toll the entry of the Releſſor, and ſo he may be put to his Writ of right in Fee: And if it be a right of an inferior degree, as in our caſe it was but for life, then he ſhould be without remedy.

17 *Aſſiz. pl.* 2. 17 *Ed.* 3. But in my opinion where the releaſe doth inure by way of entry and Feoffment being upon condition, it may in that caſe by the breach of the condition reduce the poſſeſſion, and give the Releſſor a re-entry, becauſe *in Intelligentia legis* the Land was paſſed thereby, and not a right onely: But if it had inured by way of *Mitter le droit* onely, I take it then it would reduce but a right; But in our caſe I ſup-

Bevil's Caſe. 4 *Report.*

I ſuppoſe if it had had any working at all, it was by Entry and Feoffment; yet I think nothing did inure thereby to the ſtranger, which in my caſe is called *D.* becauſe he wanted the Freehold whereupon it ſhould inure.

And ſo I end my Common Law points, and I will now in hand with my Statute.

The part of the Statute whereupon I do ground my ſubſequent matters, doth contain in it theſe words (*viz.*) *That if any perſon or perſons of what Eſtate or Degree ſoever he or they be of, that from henceforth do take upon him or them to ſit by vertue of the ſaid Commiſſions, not being firſt ſworn according to the Tenor of the Oath expreſſed in the Statute; or if any perſon ſo named and ſworn do ſit, not having Lands, Tenements or other Hereditaments in Fee ſimple, Fee tail, or for term of life, to the clear yearly value of Forty Marks above all charges to his own uſe, Except he be Reſiant and free of any City, Borough or Town Corporate, and have moveable ſubſtance of the clear value of One hundred Pounds, or elſe be learned in the Laws of this Realm, in and concerning the ſame; That is to ſay, admitted in one of the principal Inns of Court for an utter Barriſter, ſhall forfeit forty pounds for every time that he ſhall attempt ſo to do, the one moiety to the King, the other moiety to the party that will ſue therefore*, &c.

So that by this clauſe it is manifeſt, that every one that is not qualified in one of theſe degrees, is no competent Commiſſioner within this Statute.

Firſt, That he be an utter Barriſter in one of the four Inns of Court. 1.

Secondly, Or have Lands, Tenements or Hereditaments of the clear yearly value of Forty Marks above all charges, in Fee ſimple, Fee tail, or for life. 2.

Thirdly, Or be free or Reſiant in ſome City, Borough or Town Corporate, and have moveable ſubſtance of the clear value of One hundred pounds. 3.

And that perſon which is not within one of the ſaid Three parts, and yet doth take upon him to ſit in the execution of the Commiſſion, incurs two penalties:

1. The one, the forfeiture of his diſcretion for his preſumption.

2. The other, of Forty pounds for his contempt.

And therefore for the more clear examination of theſe things, I will obſerve that method in my Argument, which my caſe hath formerly preſcribed to me.

1. And firſt of all, I ſhall proceed to the perſonal abilities, and firſt of the ſon of the free Citizen of *Lincoln*, I am of opinion, that every Commiſſioner of this kind muſt be indowed with theſe three qualities.

1.	Firſt, He muſt be free of a City, *&c.*	If he want any of theſe, then he is out of this Branch of this Statute.
2.	Secondly, He muſt be there Reſiant, and	
3.	Thirdly, He muſt have in clear moveable Subſtance, One hundred pounds; and	Therefore what perſon is ſuch a Freeman, is now to be handled.

I am of opinion, that every Subject born within the King's Dominion is a Freeman of this Realm, as appeareth by the Grand Charter, *Chap.* 14. yea though he be a Bond-ſlave to a Subject; but a ſtranger born is no Freeman of the Kingdom, till the King have made him Denizen, by whoſe power alone, without the help of any other, one may be made free: And to be a Freeman of the Realm, the place of his birth is held more material than the quality of his Parents; for if Aliens have a child in *England*, it is free of the Kingdom: yet by the opinion of *Huſſey* Chief Juſtice in 1 *R.* 3. *fol.* 4. and in *Calvin's* caſe of the *Poſt Nati*, it is holden for Law, That if Ambaſſadors of this Realm have children born in *France*, or elſwhere where the Father and Mother be natural born Subjects, the Children are free of the Realm of *England*; but if either the Father or the Mother of ſuch Children were an Alien, then are not thoſe Children free. One out of the King's protection, is, as I take

1 *R.* 3. 4. *Calvin's* Caſe.

it,

it, for that time no Freeman of the Realm: But in what Caſe a Man Exiled is in, ſorteth the neareſt to our Queſtion.

Exile is one of the Eight Puniſhments which the Roman Laws did inflict upon Strangers, which be, *videlicet*,

1. *Damnum.*
2. *Impriſonamentum.*
3. *Plagæ.*
4. *Compenſatio.*
5. *Ignominia.*
6. *Exilium.*
7. *Servitudo.*
8. *Mors.*

Mr. *Bracton* doth in this manner deſcribe Exile, that is, *Certi loci interdictio*, and doth diſtribute it into Four heads; That is to ſay,

1. *Specialis, hoc eſt interdictio talis provinciæ Civitatis Burgi aut villæ.*

2. *Generalis, Interdictio totius Regni & aliquando eſt,*

3. *Temporaria, pro duobus tribus quatuor aut pluribus annis aut, &c.*

4. *Perpetua, pro termino vitæ & Exilium eſt aliquando ex arbitrio principis ſicut in exiliando Duces Hertfordiæ & Norfolciæ per Regem Ricardum ſecundum, Et aliquando per Judicium terre ut fit in caſu Piers de Gaveſton & etiam in caſu Hugonis de le Spencer junioris qui ambo fuerunt exilit' per Judicium in Parliamento.*

Abjuration alſo was a legal Exile by the Judgment of the Commonlaw, as alſo by the Statute Law; and in the Statute of *Weſtminſter the Second*, *Cap.* 35. He which raviſheth a Ward, and cannot render the Ward unmarried, or the value of his Marriage, muſt abjure the Realm; and this is a general Abjuration: And by a Statute made in 31 *Ed.* 1. Butchers are to be abjured the Town, if they offend the fourth time in ſelling meaſled Fleſh; and this is a ſpecial Abjuration. *Weſtm.* 2. 35. 31 *Ed.* 1.

But I must put this Case to a farther Question, which is, What a man Exiled doth forfeit thereby? And in my opinion he forfeits these things following;

1. First, He loseth thereby the freedom and liberty of the Nation out of which he is Exiled.

2. Secondly, He forfeits his Freedom in the Borough or City where he was free; for he which forfeits the Freedom of the whole Realm, by consequence forfeits his Freedom in every part thereof.

3. Thirdly, He is of as little esteem in our Law as if he were dead, for his Heir may enter, and so may his Wife enter into her own Lands, and may sue an Action as a Woman sole, by 31 *Ed.* 1. *&* 1 *H.* 4.

31 *Ed.* 1. 1 *H.* 4. 1.

4. And Fourthly, in my opinion he shall forfeit those Lands to the King, which he shall purchase in the Realm during his Banishment *quod vide* 15 *Ed.* 3. *Fitz. Petition' plac.* 2. But there in that case *Hugh Spencer* was banished by a Judgment in Parliament, which gave a forfeiture of his Lands; howsoever I take him as strongly barred from purchasing in the Realm during his Banishment, as an Alien is, for *fit alienigena* by his Banishment, and he is in a worse case than an Alien, because he taketh with him *Indignatio principis*: But a banished man forfeits neither Title of Honor, as Knighthood, which is *de jure gentium*, nor the Lands he had before he was Exiled, unless by special Judgment given in a legal course they be so decreed.

Fitz. abr.

Then our case goes farther, That *E.* is not Exiled himself, but *D.* his Father was Exiled, whose Heir *E.* is: now whether by the Exilement of the Father, the liberty and Freedom which *E.* might claim in the City of *Lincoln* by being the Son and Heir of a Freeman, be forfeit for his Father's Banishment, or not, is the matter of my case.

A Freeman of a City or Borough may be made divers manner of ways, as appeareth in the Case of the City of *London* in Sir *Edward Cook*'s 8th *Report*, *fol.* 126. That is to say,

City of *London*'s Case.

First,

First, By Service in his Apprentiſhip. 1.
Secondly, By Birth, by being the Son of a Freeman. 2.
Thirdly, By Purchaſe, and that is by the Common-coun- 3.
cil of the City: And at *Briſtol* by Marriage.

In the Chronicles in the Reign of *Richard* the 2d it is ſaid, *Freedom was obtained but by two means*, videlicet, *By Service, and by Birth*; yet it ſeems it may be obtained by purchaſe, becauſe the Centurion claimed his Freedom thereby, in the 22d Chapter of the Acts of the Apoſtles. In the *Iriſh Reports*, *fol.* 12. it is ſaid, *That one may be a Freeman by Birth, Marriage and Service:* Saint *Paul* indeed was born at *Tarſus* in *Cicilia* which was under the obedience of the Romans, he challenged therefore to be a Citizen of *Rome*; but I take it the Text there took it but to be National Freedom, which is ſuch a general Freedom, as *Calvin* being born in *Scotland* claimed and had in *England*, becauſe he was born under the obedience of the King of *England*; But that made not St. *Paul* free of the private Cuſtoms, Privileges and Franchiſes of *Rome*, no more than *Calvin*'s birth made him a free Citizen of *Lincoln* to the peculiar Cuſtoms of that City.

Acts 22. 28. *Davy's Rep.*

Calvin's Caſe.

If one be born in a City of Parents that are not free, the Child hereby is no Citizen by birth; and if one be born of free Parents out of the place of Privileges, as out of *Lincoln*, he yet is a Freeman by Birth; Yet in the Charter Grant of *Yarmouth* the words were, *Conceſſimus Burgenſibus de Magna Yermutha de villa predict' oriundis*, that they ſhould have ſuch liberties and ſuch; ſo that it may be the ſpecial words of the Charter may alter the caſe: yet in the caſe of the City of *London*, *Cook*'s 8th *Report*, the King by his Letters Patents could not make one a Freeman of *London*, yet he may thereby make him a Freeman of the Kingdom.

Cook's 8th *Report.*

But whether thoſe that are Free by Birth, Service or Mariage be Freemen within my Statute, or not, is a Queſtion: becauſe the words thereof be *abſolutè poſita* to all purpoſes; And therefore I take it, that this Statute intends it of ſuch as have

as have challenged their Freedom, and which have taken the Freeman's Oath, and are admitted into the Society and fellowſhip of the Freemen, Citizens and Burgeſſes; for in *James Bag's* Caſe in the 11th *Rep.* ſuch a one is taken for a perfect Freeman, and no other: So in my opinion *E.* the ſon of *D.* is no competent Freeman of the City of *Lincoln* within the Branch of this Statute; But admit he were, then it may be objected to me, that by the Exilement of the Father the Freedom of the ſon was forfeit, by reaſon he was by this Exilement become no free Citizen. But in anſwer thereunto I ſay briefly, That if the ſon had attained this Freedom by the death of his Father, as a thing deſcendible, then it had been forfeit by his fathers Baniſhment, but the ſon had this Freedom by his own birth, as a purchaſe, and not by the death of his Father by deſcent, *Ergo*, it was not forfeited by his Fathers Exilement. Like to the caſe where *J. S.* hath many Children, and then he confeſſeth himſelf Villain to *J. D.* in a Court of Record, yet his Children formerly born are Freemen and no Villains, becauſe they were free by their own births, but the Inheritance is inthralled, becauſe it is to come to the Heir by deſcent: So that I am of opinion, that if *E.* had otherwiſe been a competent Freeman, as he was not, then the Exilement of his Father could not have diſabled him.

James Bag's Caſe.

Our Freeman which this Statute ſpeaketh of, muſt not onely be free of the City or Borough, but he muſt alſo there be reſiant; for theſe words are materially placed in the ſaid Law, and here *E.* was the ſon of *D.* a free Citizen of *Lincoln*, who did there reſide and dwell, and every Child is part of the Father's family, for the Husband and Wife, Father and Children, Maſter and Servant are of a Family; and a Ward is part of his Gardians Family: But in our caſe when *D.* was Baniſhed, he then forewent his local Habitation, and ſo his ſaid ſon could not then be of his Family, nor could be intended to dwell with him who had no Habitation in the Realm: And I am of opinion, that this Statute requireth an actual Habitation or Reſiancy,

and

and not a Mathematical or Imaginary Reſiancy, ſuch a one as was in *Jeffrey*'s Caſe in *Cook*'s 5th *Rep.*; for there the caſe was, *That one did perſonally and locally dwell and reſide at* Dale, *and occupied Lands in* Sale; here the party was in Law, but not in fact, an Inhabitant in *Sale*, and was there aſſeſſed as an Inhabitant to the repair of that Church; But this Commiſſioner of ours is bound to ſuch Reſiancy as a Miniſter is to his Reſiancy, which in *Butler* and *Goodale*'s caſe in *Cook*'s *Report* ought to be locally and perſonally abiding in the Pariſh where his Parſonage or Vicarage houſe is, for reſiancy or reſidency have a like ſignification, and be both of them words of that efficacy, as they tie a man to his perſonal and actual abode and habitation with his Family: But put the caſe that in *Lincoln* there be places exempt out of the Freedom of the City, and yet within the Circle of the Walls, as St. *Martins* doth in *London*, I take it if a Freeman dwell there, this is no reſiancy intended within this Statute, becauſe the words of our Law be, *That he be Reſiant and free of the City*, which going together draweth his Habitation to the place where his Freedom is: And with this agreeth the Decree made for *London* touching Tithes in *Anno Dom.* 1535. which did no extend to St. *Martins*, becauſe it was In but not Of *London*, Dr. *Graunt*'s caſe, *Cook*'s 11th *Rep.*

Jeffrey's Caſe.

Butler and *Goodale*'s Caſe.

Dr. *Graunt*'s Caſe.

Our Freeman muſt alſo have in clear moveable ſubſtance to the value of a hundred pounds; this word (*Subſtance*) would have extended as well to ones real Eſtate as to his perſonal, if it had gone alone; but being coupled with the word *Moveable*, declares plainly that it onely extends to the perſonal Eſtate: And I take it, that theſe words (*Moveable ſubſtance*) do not onely contain and extend to ſuch things *Quæ de ſe movere poſſint*, as live Goods, Horſes, Oxen, Sheep, and ſuch like, but alſo to ſuch things *quæ de ſe movere non poſſint*, as Plate, Jewels, ready Money, Utenſils of Houſe, Mercery, Drapery, and other Wares and Goods of value, Hay, Corn, Goods of Husbandry, and Houſewifery; but Birds and Beaſts of Parks and Warrens, and Doves in

Dove-

Dovehouſes, be not valuable ſubſtance; a Hive of Bees, and a Villain for years, and a Captive taken in the Wars be, for there ſhall be paid for him a Ranſom, as is mentioned in the *Regiſter*, *f.* 102. Moneys due upon Statutes, Judgments, Recognizances, Bonds, Bills or Contracts, be not valueable ſubſtances within this Statute; for by this Statute it muſt be clear and not doubtfull or accidental, as Moneys out of hand be, which is like to a Bird in the Buſh; yet theſe be all valueable, and are valued in Inventories taken in the Eccleſiaſtical Courts: But yet the Executors or Adminiſtrators ſhall not be charged for aſſets for them, till they have received them: And in 25 *H.* 8. in *Dyer*, *fol.* 5. Obligations are not held valueable, but things in action; and if one have got Goods by tort and wrong to the value of One hundred pounds, yet this is clear valuable ſubſtance within this Law; for although the word *clear* be inſerted into the Statute, yet that relates to the value, and not to the Title of thoſe Goods: And if one have Goods as Executor or Adminiſtrator, theſe are not his own, and therefore do not inable him to be a Commiſſioner within this Law.

25 *H.* 8. *Dyer.*

Neither do the Goods of the Church inable the Parſon, Vicar or Curate, nor the Goods of a Corporation do not inable the Major and Aldermen, or Citizens of a City, or Town Corporate, for theſe do not belong to their particular perſons, neither did this ſtock in my Caſe, which is demiſed to *B.* and *C.* make them competent Commiſſioners within this Statute, becauſe they had not the property therein, but onely the uſe and occupation thereof.

And although in this Statute it is not declared in what place theſe goods which ſhould inable a man to be a Commiſſioner of Sewers ſhould be in, it will ſuffice if the party have them in any place within the Realm; for this very Law calls them *Moveable ſubſtance:* And herein I end my free Citizen, and in my opinion *E.* had neither Freedom in his perſon, nor real Eſtate in Land, nor moveable ſubſtance in any ſort to make him a competent Commiſſioner within this

this Law; yet if a Freeman be deſtitute of Goods, or want perfection in his Freedom, if notwithſtanding he have Lands to the value of forty Marks *per annum*, then he ſhall be allowed a Commiſſioner within this Statute: Touching which point of Lands I now intend to proceed in.

In the handling of this matter it is to be conſidered, which be Hereditaments within this Law; for the other two words *Lands* and *Tenements* need no expoſition; wherein I am of opinion, That Meſſuages, Cottages, Tofts, Crofts, Houſes, Land, Meadow, Paſture, Feedings, Moors, Mariſhes, Heaths, Furs, Mills, Orchards, Gardens, Hopyards, Rents, Annuities, *Prima veſtura terræ*, Piſcaries, Tythes, Penſions, Portions, Proxies, Parks, Warrens are all of them Hereditaments within this part of this Law, for the word *Hereditament* is a word of the larger ſize and largeſt extent in our Law, being *Omne quod Hæreditari poteſt*; and yet every Hereditament is not within this Branch, for it hath two other words joined therewithall (*videlicet*) *yearly value*: And therefore Franchiſes and Liberties, as Waifs, Strayes, Felons Goods, Deodands, Fines, Amerciaments, Profits of Courts, Fairs, Markets, Ferries, Hundreds, Leets, and ſuch like, are all of them out of this Statute in this point, becauſe they be not of a certain yearly value, but be accidental and depend in contingency, by the opinion in *Butler* and *Baker*'s caſe *Cook*'s 3d *Report*; But as it is there ſaid, *If theſe things have heretofore been uſually letten and demiſed for certain yearly Rents, then they may be Hereditaments of clear yearly value within this Law.* All Offices and Vocations, as Phyſicians, Chirurgions, or Trades, as Merchants, Mercers, Grocers, Drapers, and ſuch like, be neither Hereditary, nor of certain yearly value, and therefore they be not within this Law, though perhaps one gain thereby Five hundred pounds *per annum*. Alſo dry reverſions or remainders depending upon Eſtates for lives are out of this Branch, for the words of the Statute be (*having*) which is in *præſenti* and not *futuro*.

Butler and *Baker*'s Caſe.

Neither is an Advowſon of force in this point, though it be aſſets in a Formedon, yet it is no aſſets in an Action of debt brought againſt Executors; Homages, Fealties, Eſcuages, Heriots, Reliefs, *Nomine pænes*, and ſuch like, be Hereditaments; but becauſe they are not of yearly value, they are not therefore within this Law.

Alſo if a Commiſſioner of Sewers be ſeiſed of a Rent or Annuity payable every ſecond year, it doth not inable him to ſit becauſe it is not Annual, which is intended yearly, and every year, as the Prior of *Plymton's* Caſe in *Dyer*, *fol.* 123. is, but if one do grant to *J. S.* an Annuity or Rent of forty Marks in fee, payable at the Feaſt of *Eaſter* yearly, if the Grantee will then come for it to ſuch a Place, that is of certain yearly value within this Law.

Dyer 123.

But put the caſe that *A.* is ſeiſed of Land in fee, and grant to *B.* forty Marks *per annum* for his life onely; I am of opinion that *B.* is no ſufficient qualified Commiſſioner within this Law.

But if *A.* be ſeiſed of a Rent of forty Marks *per annum* in fee, and he grant the ſame to *B.* for his life, he is a competent Commiſſioner within this Law: *differentia apparet.*

Our Statute goeth on in theſe words, *That the Commiſſioner which would ſit without exception, muſt have in Lands, Tenements or Hereditaments of the clear yearly value of forty Marks to his own uſe*; Therefore a Man ſeiſed of Lands to that value in the right of his Wife, although he take the Rents and Profits to his own uſe, yet this will not inable him to be a Commiſſioner within this Law, but he muſt have them *in ejus uſu & ad ejus uſum.*

A Feoffee to a uſe before the Statute of 27 *H.* 8. of Uſes, was no competent Commiſſioner within our Statute, for he had the Land then to another Man's uſe; Neither was *Ceſtuy que uſe* ſufficiently qualified to be a Commiſſioner.

Two Tenants in Common, or Coparceners of forty pounds Lands *per annum* are neither of them of ſufficient ability to be Commiſſioners within this Law.

And the like law is of two Jointenants of Land of that yearly value, for though they be ſeiſed *per my* and *per tout*, yet in truth, and in a legal conſtruction, either of them be ſeiſed but of a moiety: So that if two Jointenants, Tenants in Common, or Coparceners be ſeiſed of Lands of the yearly value of threeſcore pounds, either of them may ſit by this Commiſſion.

A Dean and Chapter, Major and Commonalty, Maſter of a College and Fellows, which be ſeiſed of Lands and Tenements of the yearly value of a hundred pounds *per annum*, are not in reſpect thereof to ſit.

If a Biſhop, Dean, Chancellor, Archdeacon, Prebend, Parſon or Vicar be ſeiſed of Lands in *Jure Eccleſiæ* of the clear yearly value of forty Marks, I ſuppoſe theſe may ſit Commiſſioners by this Statute, for they have theſe Lands in *eorum uſu* during the time they continue in their places, which in intendment of Law is for their lives; but yet by the intendment of Law they are not to ſit in the execution of any humane Affairs; and therefore ſeeing their Perſons are out of the intendment of this Law, ſo likewiſe ſhould their Church-livings be: but this is but a conceit, for although they be not Perſons *having* theſe Lands within the Statute of 32 *H.* 8. of Wills, which is a having to diſpoſe, yet they may be within our Statute, which is a having to retain. 32 *H.* 8.

If an Executor have a Villain for years which purchaſeth Land of forty Marks *per annum*, he may ſit in the execution of this Commiſſion, for till his Lord enter he hath them to his own uſe; but if the Executor enter, then neither the Villain nor Executor can ſit a Commiſſioner by this Law.

If an Alien purchaſe Lands of ſufficient value in fee, he in reſpect of his Perſon is a diſabled Perſon to ſit, neither is he a Perſon having Lands, becauſe he is not ſeiſed thereof to his own uſe, but to the uſe of the King; But if he be made a Denizen, then in his perſon he is made capable.

The Warden of the Fleet who hath Lands belonging to his Office, may in reſpect thereof ſit a Commiſſioner by this Law.

But ſhall a Termor or Leſſee for years of Land of good value be thruſt out of Commiſſion, and be counted neither a ſufficient Landed man, nor his term and leaſe to be accepted moveable ſubſtance, and not onely ſo, but that his Farm ſhall be a farther diſablement unto him, as the Statute
13 *Eliz.* 9. of 13 *El. cap.* 9. ſeemeth to purport; the words of which Statute be, *That no Farmer or Farmers for term of years, of any Manors, Lands or Tenements, lying or being within the Precincts or Limits of any ſuch Commiſſion of Sewers, which be or which hereafter may be ordered and chargeable by any Laws, Ordinances and Conſtitutions made or to be made by virtue of any ſuch Commiſſion wherein he or they ſhall be named or appointed Commiſſioner or Commiſſioners, not having Eſtate in Freehold within the Realm, of or in Manors, Lands or Tenements of the yearly value of forty pounds, ſhall any time hereafter have power to ſit, or in any-wiſe intermeddle with the execution of ſuch Commiſſion or Commiſſions, during the time he or they ſhall continue or be ſuch Farmer or Farmers of any ſuch Manor, Lands and Tenements, and ſhall not have Eſtate of Freehold as aforeſaid; but that every ſuch Commiſſion, having reſpect onely to every ſuch Perſon or Perſons for ſuch and ſo long time as he or they ſhall be or continue Farmer or Farmers of any ſuch Manors, Lands or Tenements, ſhall be deemed and judged in Law as void.*

But yet in the cloſing up of that Statute of 13 *Eliz.* there is a Proviſo to this effect, *Provided always, that it ſhall be lawfull for any Commiſſioner, being alſo a Farmer, and not having Lands or Tenements to the clear yearly value of forty pounds of Freehold, to ſit by virtue of the ſaid Commiſſion, and have his voice and full authority with others to make and eſtabliſh Ordinances for Sewers, according to the Tenor of the Commiſſion touching and concerning all Lands and Tenements within the Precinct of every ſuch Commiſſion, other than ſuch Lands and Tenements as he or they for the time hold and*

enjoy

enjoy as Farmer, as he or they might have done before the making of that Statute; but he could not have ſitten in execution of this Commiſſion before the making of this Statute, unleſs he had beſides his leaſe Lands to the value of forty Marks *per annum*: And therefore a leaſe for years is no inablement at all, but a diſablement, as this Statute declares.

But the times when this having of Lands, *&c.* will ſuffice to qualify a Commiſſioner to ſit within this Law, is now to be conſidered of, wherein I am of opinion, that the *When having* muſt be referred to the *Then ſitting*: For the words of the Statute be, *That none take upon him to ſit, not having Lands to the yearly value of forty Marks*; ſo that if he have not Lands of that value when he is firſt made a Commiſſioner, yet if he have ſo much when he ſitteth upon the Commiſſion, it will ſatisfy this Law; and if once he have Land of that value and ſitteth, and after ſell the Land away, or if they be evicted from him, he is then diſabled to ſit as a Commiſſioner by this Statute: And ſo if he were but Tenant for the life of *J. S.* and *J. S.* dieth, he ought not to ſit: In 12 *H.* 7. 4. a Juror which was to paſs upon trial of Land was to have forty ſhillings *per annum* of Freehold, and after he was impanelled, and before he was ſworn, he ſold away his Land, and when he came to be ſworn, he was challenged for want of Freehold, but the challenge was diſallow'd, for after he was impanelled, his Land (though after ſold away) was chargeable with the Iſſues which he after might loſe in that matter; and with this agreeth 14 *H.* 7. 2. by *Frowick*: But our Statute is more preciſely penned, which is, *That none do preſume to ſit, unleſs he have Lands of that value, or be*, &c. therefore when he ſits he muſt have the Lands. 12 *H.* 7. 4. 14 *H.* 7. 2.

And if *A.* do bargain and ſell his Lands to *B.* by Deed intended of that value, and before the inrollment of the Deed *B.* do ſit as Commiſſioner, and after the Deed is inrolled, yet this doth not qualify his offence, and the relation of the working of this Deed doth not aſſiſt him to take off the penalty of this Law.

Alſo

Alſo a man diſſeiſed is during the Diſſeiſin diſabled to ſit, for he had not then power to deviſe the Lands by the Statute of 32 *H.* 8. of Wills, for that Statute doth as ours doth, uſe the word *Having* in *preſenti*, and not in *futuro*.

32 *H.* 8.

And thus much I thought convenient upon this occaſion to deliver my opinion, when the Commiſſioner muſt have Lands of forty Marks *per annum*, to inable him to ſit as a Commiſſioner within this Statute.

To treat of the utter Bariſter I need not, for when he hath taken the Oath mentioned in the Statute, he is an abſolute and compleat Commiſſioner within this Law, to all purpoſes, although he have neither Lands or Goods, according as the Statute appointeth others to have.

It is enacted likewiſe by this Statute of 23 *H.* 8. 5. that if any Perſon not qualified as aforeſaid, do ſit by virtue of the Commiſſion of Sewers, he ſhall forfeit forty pounds for every time that he ſhall attempt ſo to doe, the one half thereof to be to our Sovereign Lord the King, and the other half thereof to the uſe of him or them, that will ſue therefore by action of debt, bill, plaint or information, in any of the King's Courts, in which action or ſuit no wager of Law ſhall be admitted, nor any eſſoin or protection ſhall be allowed.

In this caſe when the Perſon who ſits contrary to the Statute hath forfeited one forty pounds, he may forfeit another forty pounds for ſitting a ſecond time, though there be no conviction of him for that firſt time, becauſe the penalty is equal and alike for every offence: But otherwiſe it is where there are ſteps or gradations

dations in a penal Law, to double or increaſe the penalty; for there he muſt be convicted for the firſt offence, before he can forfeit any thing for the ſecond offence, which prior conviction not being neceſſary here, the Party who ſits two ſeveral times by virtue of this Commiſſion, may be ſued for the whole eighty pounds together, and the like for as many more times as he ſhall ſit, not being qualified, as the Act requires.

By the Statute of 18 *Eliz. cap.* 5. It is enacted, That none ſhall be admitted or received to purſue againſt any Perſon, upon any penal Statute, but by way of information, or original action, and not otherwiſe: See *Co.* 6. 19, 20. *Moor* 412. *caſe* 565. and 600. *caſe* 827. *Cro. Hil.* 39 *Eliz.* 544. And no Proſecutor *Qui tam, &c.* can now ſue by Bill upon any Statute precedent to that of 18 *Eliz.* as was reſolved in *Woodſon* and *Clarke's* Caſe, in a popular ſuit brought by Bill in the *King's Bench* upon the Statute of 23 *H.* 6. *cap.* 10. of Sheriff's, *Co.* 3. *Inſt.* 194. and in *Udeſon* and the Mayor of *Nottingham's* Caſe, *Moor* 248. *caſe* 390. contrary to the opinion in *Style* 381, 382. So that although this Statute of 23 *H.* 8. 5. gives the Proſecutor power to ſue by Bill, yet that is taken away by 18 *Eliz.* 5. and he can ſue by way of information or original action onely.

18 *Eliz.* 5.

Co. 6. 19, 20. *Moor* 412. 600. *Cro. El.* 544.

23 *H.* 6. 10.

3 *Inſt.* 194.

Moor 248.

Style 381, 382.

The Informer or Proſecutor who ſues a Commiſſioner (not qualified) upon this Statute for the

the forty pounds muſt begin his ſuit within one year after the offence committed, otherwiſe he ſhall not have any part of the penalty; For the
31 *Eliz.* 5. Statute of 31 *Eliz.* 5. reſtrains the Proſecutor, *Qui tam, &c.* upon all penal Laws (except the Statute of Tillage) to that time: But if he doth not proſecute within a year after the offence, yet the King may at any time within two years after that year ended: And therefore it was reſolved, *Hil.* 12 *Jac.* That where an Information was brought in the Court of Exchequer, *tam pro Domino Rege quam pro ſeipſo* upon the Statute of 3 *Jac. cap.* 4. for three years forbearance to receive the Sacrament, although it was not good for the Informer, yet it was well enough as to
Cro. Jac. 166. the King, *Cro. Jac.* 166. *Syvedale verſus* Sir *Edward Lenthall.*

By the King's Courts, The four ordinary Courts at *Weſtminſter* ſeem to be here onely intended; For they are the King's general Courts, where the King's Attorney may acknowledge or deny: And the words of this Statute being general (*ſcil.* in any of the King's Courts) are left to the conſtruction of Law, where the Rule is, *verba æquivoca, & in dubio poſita intelliguntur in digniori & potentiori ſenſu:* And in this ſenſe ſhall theſe words (the King's Courts) be conſtrued in all penal Statutes where the penalty is
Jones 193. to be recovered in a popular ſuit, *Jones* 193.

Co. 6.

Co. 6. 19, 20. *Moor* 421. *case* 581. *Cro. Mich.* 4 *Car.* 146. *Cro. Trin.* 4 *Car.* 112, 113. *Hutton* 99. so that the Commissioner, who sits by virtue of the Commission of Sewers, without being qualified, can be sued onely in those Courts for the forty pounds, and not in any inferior Court.

Co. 6. 19. 20. *Moor* 421. *Cro. Car.* 146. 112, 113. *Hutton* 99.

And, as it seems, the Commissioner so sitting contrary to this Act cannot be indicted for such offence; For it hath been held for Law, that when a Statute appoints a penalty for the doing of a thing which was no offence before, and appoints how it shall be recovered, it shall be punished by that means, and not by indictment; and so it was resolved in the Case of *Innocent Castle*, who was indicted for acting as a Justice of Peace, not having Lands to the value required by the Statute of 18 *H.* 6. *cap.* 11. but was discharged of the Indictment, for that the Statute had prescribed another way of punishment, *viz.* by an Action of Debt, *tam pro Domino Rege, &c. Cro. Mich.* 20 *Jac.* 643. And consonant to this was the opinion of all the Judges of *England*, save three, *Mich.* 6 & 7 *Eliz. Dyer* 236. And yet see *Crofton*'s Case in *Modern Reports* 34. where there is related an opinion of two Justices to the contrary, and that the Party may in such case be punished by Indictment.

18 *H.* 6. 11.

Cro. Jac. 643.

6 & 7 *Eliz. Dyer* 236. *Modern Reports* 34.

The Second queſtion.

The ſecond queſtion in my caſe touching this Statute, is, Whether the Counteſs of *Warwick* be a compatible Commiſſioner within this Statute.

Although it is uncouth in our Law to have Women Juſtices and Commiſſioners, and to ſit in places of Judicature, yet by the Authorities enſuing you ſhall find this a point worth inſiſting upon, both in Humane and in Divine learGen. cap. 1. ning; for in *Geneſis*, Chapter the firſt, after the Creation of all other Creatures being finiſhed, the Heavens adorned, and the Earth repleniſhed, God ſaid, *Let us make man in our own Image, after our likeneſs, and let him have dominion over the fiſh of the Sea, and over all the Earth, and every creeping thing that creepeth upon the Earth: So God created man in his own Image, in the Image of God created he him, Male and Female created he them; and ſaid unto them, Be fruitfull and multiply, and repleniſh the Earth, and ſubdue it, and have dominion over the fiſh of the Sea, and over the fowl of Heaven, and over every living thing that moveth upon the Earth:* This was the firſt Commiſſion that ever was granted, and it paſſed under the divine immediate Seal of the Almighty, and extended over the whole world; and by the virtue of the word *Dominamini* in the Plural number, God coupled the Woman in Commiſſion with the Man. But in the Exodus 18. 18th Chapter of *Exodus*, Ver. 21. *Jethro* adviſeth and counſelleth *Moſes* his ſon in law *to provide out of all the people men of truth, hating covetouſneſs, and place ſuch over them to be Rulers of Thouſands, Rulers of Hundreds and over Fifties and Tens*; where by the word *Men* twice repeated by *Jethro*, this place of Scripture ſeemed to exclude Women wholly from Government, and the former Commiſſion extended over Fiſhes, Birds and Beaſts, and neither over men nor women: And in the firſt of the *Corinthians*, Chapter 14. it is 1 Cor. 14. ſaid by St. *Paul*, *Let the women keep ſilence in the Churches, for it is not permitted to them to ſpeak.* And in *Grendon*'s caſe in the *Comment. fol.* 497. *Dyer* ſaith, *That women could not adminiſter the Sacraments, nor were they permitted*

mitted to say Divine Service. And in the second Chapter of *Timothy*, V. 12. he saith, *We suffer not the woman to rule over the man*; but this last of *Timothy* may be most aptly applyed to husband and wife. 1 Tim. 2.

I remember out of the Abbey Book of *Evesham* this Note worthy of observation, *Quod Alicia Peeres Regis miniona supra modum mulierum nimis supergressa, sui etiam sexus & fragilitatis feminiæ Immemor, nunc Justiciarios Regis, nunc in foro ecclesiastico juxta doctores sedendo, & pro defensione causarum suadere & etiam contra jus postulare minime verebatur, unde propter scandalum petierunt à rege in Parliament' tent'* An. 50 Ed. 3. *penitùs amoveri*; but hereby I collect, that she was not in Commission with the Judges Temporal or Spiritual, but was a favorite of the King's, and took upon her to intermeddle in businesses nothing concerning her: But whether the Text meant it, for a Woman to sit Judge in a Court of Justice, was *contra modum mulierum*, or because she sate there to wrest righteous Judgment, I refer to the Readers of that History; For *Debora* was Judge of *Israel*, and Judged the people as the fourth of *Judges* hath it. *Dyer* indeed saith in *Grendon*'s case, *That divers Churches were appropriated to Prioresses and Nunneries, whereof women were the Governesses*; whereby and by the said Chapter of the *Corinthians* it appears, that women might be admitted to have Rule and Government over the possessions and persons Temporal and Ecclesiastical, but were not admitted to have *curam animarum*, nor to meddle with the Administration of the Service or Sacraments. Judges 4.

And for Temporal Governments, I have observed women to have from time to time been admitted to the highest places; For in ancient Roman Histories I find *Eudochia* and *Theodora* admitted at several times into the sole Government of the Empire: and here in *England* our late famous Queen *Elizabeth* whose Government was most renowned: And *Semiramis* governed *Syria*: and the Queen of the South which came to visit *Soloman*, for any thing that ap-

pears to the contrary, was a ſole Queen: And to fall a degree lower, we have preſidents that King *Richard* the firſt, and King *Henry* the fifth appointed and deputed by Commiſſions their Mothers to be Regents of this Realm in their abſence in *France*: And the wiſe and renowned Lady *Margaret* Counteſs of *Richmond* was put in Commiſſion, and *Humfrey de Bohune* Earl of *Hereford* was by Tenure Conſtable of *England*, which is a Judge in Martial affairs, and he died without iſſue Male, by reaſon whereof the Office (amongſt other things) deſcended to his two Daughters
11 *Eliz. Dyer.* and Co-heirs: And in the 11 of *Elizabeth*, in *Dyer*, it is holden for Law, That although this was an Office of Juſtice, yet they might execute the ſame by deputy; for in truth women were unfit Martialiſts to judge of matters of that nature; and yet it is clear, a deputy doth nothing in his own name, but in the name of his Maſter or Miſtreſs, therefore the Martial Court was to be kept in their names: But yet I will deſcend a ſtep lower; It was adjudg'd in *B. R.* 5 *Car.* 1. That the Office of Marſhal of that Court well deſcended to a *Feme*, and that ſhe might execute it by her Deputy; See *Hern*'s Reading 4. And doth not our Law temporal and ſpiritual admit of women to be Executrixes and Adminiſtratrixes? and hereby they have the rule or ordering of great Eſtates, and many times they are Gardianeſſes in Chivalry, and have thereby alſo the Government of many great Heirs in the Kingdom, and of their Eſtates.

10 *H.* 7. And in 10 *H.* 7. a man deviſed his Lands to be ſold by a woman, and died, and ſhe ſold the ſame to her husband: So by theſe caſes it appeareth, that the Commonlaw of this Kingdom ſubmitted and committed many things to their Government; yet the Statute of Juſtices of the Peace is like to *Jethro*'s counſel to *Moſes*, for there they ſpeak of men to be Juſtices, and ſeemeth thereby to exclude women; But our Statute of Sewers is, *Commiſſion of Sewers ſhall be granted by the King to ſuch perſon and perſons as the ſaid*

Lords

Lords ſhould appoint; So the word *perſons* ſtands indifferently for either Sex; And therefore although by the weakneſs of their Sex they are unfit to travel, and they be for the moſt part uncapable of learning to direct in matters of Judicature, for which cauſes they have been diſcreetly ſpared, yet I am of opinion, for the authorities, reaſons and cauſes aforeſaid, that this honorable Counteſs being put into Commiſſion of the Sewers, the ſame is warrantable by the Law; and the Ordinances and Decrees of Sewers made by her and the other Commiſſioners of Sewers, are not to be impeached for that cauſe of her Sex.

And I conclude here, that although in diſcretion women have been ſecluded as unfit; yet they are not in Law to be excluded as uncapable.

If an Infant above the age of Fourteen, and under the age of One and twenty be made a Commiſſioner, his Infancy ſhall be no cauſe to diſable the Laws made by him; young *Daniel* was Judge over both the Elders. And in Little *Brook, fol.* The caſe is, a Parſon or Prebendary being within age made a Leaſe for years of his Benefice, and would but could not after avoid it for his Nonage, for ſeeing the Church had made him of full age to diſcharge the ſpiritual Office, our Commonlaw thought it fit to inable him to diſpoſe of his Temporalties: and in 21 *H.* 7. *fol.* 12. and 13. the caſe is put by *Bridges*, and confirmed by Juſtice *Syl-liard*, and was not denied by any, that an Obligation made by a Major and Commonalty, Dean and Chapter, Abbot and Covent, ſhall not be avoided for the Nonage of the Major, Dean or Abbot; yet all theſe ſerve in place of Government, howbeit in the ſaid matters their Nonages ſhall not impeach them: And in the third of *Iſaiah* it is ſaid, *I will give them Children to their Princes, and Babes to rule over them*; noting thereby an unfitneſs in them to govern, but that debarred them not of the place: and of this matter this ſhall ſuffice. 21 *H.* 7. Iſa. 3.

But now admit, as oftentimes it falls out, that Commiſſioners ſhall ſit in the execution of this Commiſſion of Sewers,

ers, which have not taken the Oath, which have not Lands of value, or which is not a free Citizen, and yet there be Ordinances, Decrees and Laws made at thoſe times; Now whether thoſe Laws and Ordinances ſo made by a diſabled Commiſſioner be void or not, is the queſtion; or whether the diſabled Commiſſioner ſhall onely undergo the penalty of forty pounds.

6 *H.* 8. There was a Statute made in 6 *H.* 8. *cap.* 10. whereby it was enacted, *That the Chancellor of* England *for the time being ſhould make no Commiſſion to any Perſon or Perſons (except he had Lands and Tenements of Eſtate of Freehold to the yearly value of twenty pounds, or elſe be Juſtice of the* Quorum) *within any of the Shires where he ſhould be made a Commiſſioner; and if any ſuch Commiſſion were directed to any Perſon or Perſons not having Lands or Tenements to the yearly value of twenty pounds, or not being one of the Juſtices learned of the* Quorum, *as aforeſaid, That then every ſuch Commiſſion, and all Preſentments and Accuſations had and preſented before any ſuch Commiſſioners, be utterly void and of none effect.*

But this Statute is in time expired long ago, and therefore it is no interruption to our Commiſſioner; for although the Statute of 23 *H.* 8. which I read on hath a Clauſe in it in effect, *That all and every Statute and Ordinance heretofore made concerning the Premiſſes, made in the time of the ſaid King, or of any of his Progenitors, not being contrary to that Statute, ſhould ſtand in force*; yet theſe words do not ſet on foot a Statute expired in time, as that of 6 *H.* 8. is: Alſo in the ſaid Statute of 13 *Eliz.* if a Termor or Leſſee for years be in Commiſſion, all Laws made which concern Lands whereof he is a Farmer are void as to him, *vide antea.*

23 *H.* 8. But to relie on our Statute of 23 *H.* 8. in my opinion it doth not avoid any of the Laws and Ordinances made by diſabled Commiſſioners, but doth onely inflict the puniſhment and penalty of Forty pounds a piece upon every of them, for every time they or any of them ſhall ſit in or about

bout the execution of this Commiſſion; yet it ſeemed in the caſe *de Jure Regis Eccleſiaſtico*, That whereas the Statute of firſt of *Elizabeth* authorized the Queen to grant Commiſſions to natural born Subjects, that if ſhe had granted the ſame to an Alien, the acts done by him had been void. Caſe *de Jure Regis Eccleſiaſtico.*

But now my caſe proceeds to the next point or ſtep, and that is touching the Law and Ordinance made to raſe the ſaid Were; I inſerted this clauſe in my caſe, becauſe I had not formerly occaſion or fit opportunity to treat of the Lets, Impediments and Annoyances which be contained within this Statute of 23 *H.* 8. and therefore I took this occaſion to cloſe up this daies Exerciſe with the Diſcourſe of them.

Theſe by name are ſuch Impediments and Annoiances as this Statute ſpeaketh of;	1. Streams. 2. Mills. 3. Bridges 4. Ponds. 5. Fiſhgarths. 6. Mildams. 7. Locks. 8. Hebbingweres. 9. Hecks, and 10. Floudgates.	And the reſt muſt be compriſed within theſe general words (*videlicet*) *Other like Lets and Impediments.*

And the diſcourſe upon all theſe will reſt moſt upon the Statutes heretofore made touching the ſame.

And the firſt Statute thereof made is in *Magna Charta*, cap. 23. *Omnes kidelli deponantur de cetero penitus per Thameſiam & Medweyan & per totam Angliam niſi per coſteram maris*; what this word *kidellum* ſignifieth appeareth by the title of that Statute, which is Weres. *Magn. Chart.* cap. 23. This extends not to the King's, *Keddels per Keble* in 13 *H.* 7. 35.

The next Statute to this is, 25 *Ed.* 3. *cap.* 4. which doth enact, *That all Mills, Weres, Stanks, Stakes and Kiddels which were levied and ſet in the time of King* Edward (that King's Grandfather) *and after, whereby Ships and Boats were diſturbed,* 25 *Ed.* 3.

ſturbed, that they might not paſs the Rivers as they were wont, ſhould be cut and pulled down without being relevied.

The ſaid firſt Statute is general, that all Weres ſhould be put down but by the Seacoſts, yet this word (*All*) are intended of ſuch onely as were erected without lawfull Warrant; and the ſaid Statute of 25 *Ed.* 3. doth explain the generality of the ſaid former Statute; For thereby it appears, That Weres erected in Navigable Rivers where Ships and Boats were wont to ſail, ſhould be extirped, becauſe they were a hinderance to Navigation; but this extends onely to navigable Streams which have been navigable by uſe and cuſtome; and it is manifeſt by this Statute, that theſe Weres which were ſo to be put down muſt be onely ſuch as were erected in the time of *Edward* the Firſt, and ſithence, becauſe thoſe ſeemed to be erected without lawfull authority; and being but erected in thoſe times, they had not the countenance of cuſtome and preſcription to ſtrengthen them.

The next Statute in time is that of 45 *Ed.* 3. *cap.* 2. which confirms the ſaid Statute of 25 *Ed.* 3. and then adding thereto, that if any ſuch annoiance be done, it ſhall be pulled down; and that he which ſhall relevy ſuch annoiance, and be thereof duly attainted, he ſhall incur the penalty of one hundred Marks to the King, to be levied by the Eſtreats of the Exchequer; and the penalty is thereby given for the inhauncing of ſuch Weres, Mills, Stanks, Stakes and Kiddels: This Statute is in part a confirmation of the ſaid Statute of 25 *Ed.* 3. and in other part thereof it is a new Act in theſe Points.

45 *Ed.* 3.

1. Firſt, In the forfeiture of a hundred Marks.
2. Secondly, This is the firſt Statute in my opinion made againſt inhauncing of ſuch things which are counted annoyances.
3. And thirdly, It gives the like penalty againſt him which ſhall relevy the annoyance, as againſt the Inhauncer: And becauſe this Statute depends upon the ſaid Statute of 25 *Ed.* 3. it extendeth therefore but to navigable Streams.

The

The Statute of 1 *H.* 4. *cap.* 12. is a Statute in theſe Points of great conſequence, and it doth alſo confirm the ſaid two former Statutes of *Ed.* 3. and doth thereto alſo make additions in theſe inſuing Points:

First, That Juſtices ſhould be aſſigned to ſurvey and keep the Waters and great Rivers, and to correct and amend the defaults, as well by ſurvey, advice and diſcretion, as by inqueſt. 1.

Secondly, To ſurvey the Weres, Mills, Stanks, Stakes and Kiddels in old time made and levied before the time of *Ed.* the Firſt, and them which they ſhould find too much inhaunced or ſtraitned, to correct, pull down and amend; ſaving always a reaſonable ſubſtance of Weres, Mills, Stanks, Stakes and Kiddels ſo in old time made and levied. 2.

Thirdly, And if any ſuch annoyances of Weres, Mills, Stanks, Stakes and Kiddels of Paſſages, and ſtraitning in old time made and levied, be adjudged and awarded by the ſaid Juſtices to be pulled down and amended, he that hath the Freehold of the ſame ſhall make thereof execution at his own coſts within half a year after notification thereof made, upon pein of a hundred Marks; and he which ſhall relevy, or inhaunce or ſtraiten them againſt the ſaid judgment, ſhall forfeit one hundred Marks to the King, to be paid into the Exchequer. 3.

Fourthly, And he which ſhall find himſelf grieved by execution or otherwiſe in this behalf againſt right and reaſon, he may purſue and have right. 4.

First, by this Statute I collect theſe matters; First if that a Were, Mill, Stank, Stake or Kiddel be newly or of late years built and erected in any Streams without warrant or lawfull authority, the ſame may be cauſed to be pulled down by Order of the Commiſſioners of Sewers, at the coſts of the Party which erected the ſame. 1.

Secondly, If Weres, Mills, Stanks, Stakes or Kiddels have ſtood and been time out of memory in Rivers or Streams, and ſo have warrant from cuſtome and preſcription, 2.

tion, theſe may not be cut up or pulled down by the Commiſſioners of Sewers, becauſe long uſe and cuſtome, which is a Law of this Kingdom, hath eſtabliſhed them.

3. Thirdly, If there have been Weres, Mills, Stanks, Stakes or Kiddels time out of memory in Rivers or Streams, which of late years have been inhaunced, inlarged, or otherwiſe exceeded the ancient ſize and accuſtomed compaſs, the exceſs in thoſe caſes is onely to be abated and pulled down; but ſo far as the ancient ſize did extend to is not to be impeached: For the words of the ſaid Statute be, *That there be reſerved always the reaſonable ſubſtance thereof in old times accuſtomed.*

And in my opinion the generality of the ſaid Statute of *Magna Charta*, *cap.* 23. is reſtrained by the ſucceeding Statutes, if the expoſition ſhould have been as large as the letter is.

And theſe three diſtinctions do fully declare the true effect of the ſaid preceding Statutes.

4 *H.* 4. Then next in order of time is the Statute of 4 *H.* 4. *c.* 11. which reciteth, *That by Weres, Stakes and Kiddels in the water of* Thames, *and in other great Rivers through the Realm, the common paſſage of Ships and Boats be diſturbed, and much People periſhed; and alſo the young fry of Fiſh deſtroyed, and againſt reaſon waſted and given to Swine to eat;* Therefore this Statute enacts, *That all former Statutes thereof made be holden, kept and put in execution.*

Here be two things which none of the former Statutes took order for;

1. The one is the periſhing of the King's People;
2. The other the deſtroying of the fry of Fiſh which were occaſioned by the erecting of theſe Weres, Mills, *&c.* Yet theſe are buſineſſes which are otherwiſe provided for, and be not pertinent to theſe Laws of Sewers: And therefore I ſhall paſs them over without any other farther explanation thereof.

12 *Ed.* 4. The Statute of 12 *E.* 4. *cap.* 7. doth confirm all the ſaid former Statutes made againſt Lets, Impediments and Annoyances;

noyances; And doth farther enact, *That if contrary to the award, rule or judgment of the Commissioners made according to the Statute of* 1 H. 4. *it be found, that any Weres, Fishgarths, Mills, Mildams, Locks, Hebbingweres, Stakes, Kiddels, Hecks or Floudgates be made, levied, inhaunced, straitned or inlarged against the said Statute, the Offenders therein contrary to the aforesaid award, rule and judgment being warned by the Sheriff or Under-sheriff of the County upon a* Scire facias *to that purpose directed where those Annoyances be, and within three months after such garnishment do not wholly amend, break down and avoid the said making, levying and inhauncing, straitning or inlarging, That the Party being defective in that behalf shall forfeit one hundred Marks to the King, to be levied by Estreats out of the Exchequer; and if the Offender, his Heirs, Assignee or Assigns, or any of them do defer or continue the same default, contrary to the award, rule and judgment of the Commissioners, he or they shall forfeit one hundred Marks, the one moiety to the King, the other moiety to the Party that will sue for the same.*

And also it was farther enacted, *That if any Person or Persons, other than such against whom such award, rule or judgment was made, or any of them, do presume to occupy or continue any of the Weres, Fishgarths and Impediments aforesaid, or other Incumbrances, he shall forfeit for every default for every month one hundred Marks, the one half to the King, the other half to the Party that will sue.*

It appeareth that this Statute speaketh of Milldams, Locks, Hebbingweres, Hecks and Floudgates, which the other Statute never speaketh of; so in extent thereof it hath more inlargment: And in my opinion all the foresaid Statutes did extend onely to navigable Streams and Rivers, with Ships and Boats.

If a Lessee for years of Lands or Tenements where any such Nusance or Annoyance is doth continue it, he is within the latter clause of this

Statute, though it was erected before his time; For a Leſſee for years may lawfully abate any ſuch Nuſance, as was reſolved in the Caſe of *Brent* and *Haddon*, *Cro. Mich.* 17 *Jac.* 555. And may be puniſhed for the continuance of it, *Leonard* 2. 103. *Waſhbourn verſus Mordant.*

Cro. Jac. 555.

Leon. 2. 103.

In the Tenth *Report* of Sir *Edward Cook*, the caſe of *Cheſter* Mills upon the River of *Dee*, was as inſueth, *That a Cauſey or Milſtank of Stone in the River of* Dee, *in the City of* Cheſter, *was made and erected for the neceſſary maintenance of certain Mills, ſome of the Kings, others of the Subjects, which ſtood at the end of the Cauſey*; were of late by the Decree of the Commiſſioners of Sewers ordered, That a breach therein of Ten Roods or Pearches ſhould be made, which Cauſey or Milſtank was by the agreement of all parties erected before the time of *Ed.* the firſt, and ſo had continuance without any inhauncing or exaltation: And whether this Decree was warranted by any of the ſaid Statutes or not, was the queſtion, which was referred by the Lords of the Counſel to the two Chief Juſtices, *Fleming* and *Cook*, and to *Tanfield* the Lord Chief Baron, to be conſidered on; and the ſaid Chief Juſtices and Chief Baron declared their opinion, That the ſaid Decree was not warranted by any of the ſaid Statutes; for they ſaid that the two Statutes of 25 *Ed.* 3. and 45 *Ed.* 3. extended but to ſuch Impediments as were ſet up and erected in the time of *Ed.* 1. and after; and that the generality of the Statute of *Mag. Char. ca.* 23. was reſtrained by theſe two Statutes; And that the Statute of 1 *H.* 4. extended to ſuch Weres, Kiddels, *&c.* and other Lets as were erected before the Reign of King *Ed.* the firſt, and which have been inhaunced and exalted ſithence, and ſo was out of all thoſe Laws, becauſe there was no ſuch inhauncing.

And the Statute of 23 *H.* 8. which I now read on, did not alter the former Statutes in theſe points; But provided,

That

That all and every Statute, Act and Ordinance heretofore made concerning the Premiſſes in that Act recited, not being contrary nor before then repealed, ſhould ſtand then in force: But the ſaid Judges did hold opinion, that all the ſaid Statutes ſtood unrepealed, and accordingly made their Report to the Lords of the Council.

The Commiſſioners of Sewers ordered that *J. S.* who had a certain Mill ſhould make the holes of his Floudgates of a leſs ſize, than they were before; and the order being removed by *Certiorari* into the King's Bench, it was moved to be quaſhed, for that 1. It did not appear by the order, what Eſtate *J. S.* had in the Mill. But the Court held it to be well enough, for that every one who is owner of a Mill, ought to repair the Floudgates, whatever Eſtate he hath in the Mill. 2. Another objection was, that the Commiſſioners had no power to make any ſuch alteration in an ancient Mill, as this ſhall be preſumed to be; and it doth not appear that there hath been any inlarging of the Floudgates ſince the Mill was firſt erected; But it was anſwered by the Court, that it ſhall not be intended to be a Mill before the time of *E.* 1. and if it were not, the Commiſſioners had power to ſtraiten or inlarge the Floudgates, according to the caſe of *Cheſter* Mills, and the Court confirmed the order, as to that Point; *Siderfin* 1. 145. *Siderf.* 1. 145.

There be many private Statutes made for the abating private Weres in ſome Streams which are not within my intent

to

to recite, farther than by naming of them, becauſe I take it they are not confirmed by the Statute I read on; As 11 *H.7. cap.*5. *Southampton:* 14 *H.*8. *cap.*13. 23 *H.*8. *cap.*18. *Havens:* 25 *H.*8. *Cap.*7. *for killing Fry of Salmons,* 27 *H.* 8. *Raſtal Havens* 9, 10, 11.

In 19 *Jacobi Regis* there was a great Cauſe depending in the Court of the Dutchy at *Weſtminſter*, between *Benedict Hall* Eſq;, Plaintiff, and *John Maſon*, *George Warrel*, and *Thomas Powel*, Defendants; which was in effect as followeth, *That Queen* Mary *was ſeiſed of the Manor of* Monmouth, *with the Appurtenances in that County, and of a Free fiſhing in the River of* Wye, *and of a Were and a Fiſh-yard there, which were erected in the time of the ſaid Queen, in the place where an old Foundation of an ancient Were did ſtand:* This Were had been letten by the ſaid Queen, and alſo by Queen *Elizabeth*, under the Seal of the ſaid Dutchy by yearly Rents, and ſo there were ancient Preſidents ſhewn in that Court, whereby it appeared, that the ancient Were there had been letten to Farm by the Earls and Dukes of *Lancaſter*, and by the Kings and Dukes for a long time for yearly Rents: So that it was manifeſt that it was an ancient Were time out of memory: And this Were and Fiſh-yard, and the profits of fiſhing were letten by the King's Majeſty that now is under the Seal of the Dutchy of *Lancaſter*, in the Tenth year of his Reign, to one *John Abrahall* Eſquire, for One and Thirty years, for and under the yearly Rent of Six Pounds thirteen Shillings and four pence paiable to his Majeſty his Heirs and Succeſſors; And the ſaid *Abrahall* being ſo thereof poſſeſſed, did afterwards in the Tenth year aſſign the ſame to one *William Hall*, Eſq; by reaſon whereof the ſaid *William Hall* was thereof poſſeſſed; and in the 12th year of this King, made his laſt Will and Teſtament, and did thereby ordain the complainant his Executor, and after died; by and after whoſe deceaſe the Complainant came to be poſſeſſed of the ſaid Leaſe and Term therein to come; and in the Nineteenth *Jacobi Regis*, the Commiſſioners of Sewers in thoſe parts cauſed a Jury to be impanelled and

ſworn,

ſworn, touching this Were and Fiſh-yard and gave therein a Verdict to this effect; that is, *That* Benedict Hall *the Complainant was poſſeſſed of the ſaid Were, called* Monmouth *Were, upon the River of* Wye, *which was exceſſive high and hurtfull, and was an Impediment to the common paſſage of Boats, Barks and Ballangers up and down the ſaid River, and by means thereof they could not paſs but in great danger, which if the ſaid Were were not, Boats of two or three Tuns might paſs the River; and that the ſaid Were had been the death and drowning of one of the King's Subjects, and is the cauſe of the ſcarcity, dearneſs and want of Salmons, and other Fiſh within the ſaid River, by reaſon many of them were taken in Gins of the ſaid Were, when they were out of ſeaſon, and that the ſame was a great abuſe, wrong, enormity and annoiance to the whole Countrey.*

Whereupon the ſaid Commiſſioners made an Ordinance or Decree, ſetting forth thereby in effect as followeth, *That whereas it did appear to them, as well by the examination of Witneſſes, as by the ſaid Verdict of the Jurors, and by their view, that the ſaid Were was a great Let and hinderance to the common paſſage of Boats and Ballengers up and down the River, indangering of the lives of the King's Subjects, and to the deſtruction of Fiſh, as the Salmons and Fry thereof; They therefore ordered, That the ſaid Were ſhould be overthrown, and that the Timber and Stone thereof ſhould be removed, whereby the Chanel ſhould be cleared for paſſage of Boats*; And accordingly did direct their Warrant under their Hands and Seals to the Defendants, authorizing them thereby to overthrow the ſaid Were, which they performed accordingly: and all this matter of the verdict of the Jury, and Decree of the Commiſſioners were ſet forth at large in the Defendant's Anſwers; and after examination and publication of Witneſſes, the Cauſe came to be heard in the ſaid Dutchy-court before Sir *Humphrey May*, Knight, Chancellor of the Dutchy, Sir *John Denham*, Knight, one of his Highneſs's Barons of the Exchequer, an Aſſiſtant to that Court, and Sir *Tho. Chamberlain*, Knight, one of the

King's

King's Juſtices of his Bench, another Aſſiſtant of the ſaid Court, and Sir *Edward Moſley*, Knight, Attorney of the ſaid Court, who were of opinion, That the ſaid Were being an ancient Were by preſcription and cuſtome, it ought not to have been overthrown by the Decree of the Commiſſioners of Sewers, and that the ſaid verdict of the Jurors was defective, becauſe though they preſented the ſaid Were to be over high and inhaunced, yet in regard they did not preſent in *quanto* nor in *qua parte*, the ſaid Were was inhaunced above the ancient aſſize, therefore they eſteemed the ſaid Verdict of no validity.

But now it comes next in time and turn to declare my opinion touching and concerning Bridges, Mills, Mil-dams, Mil-ſtanks, Floudgates, Hecks, Locks and Hebbing-weres, which in the ſaid Statutes be ſet forth for Lets, Impediments and Annoiances, wherein they are to receive their Expoſition according to the ſaid caſes of Weres, without other diſtinctions; for if they have had continuance time out of memory, then are they the proper and peculiar Inheritances of the King, or of his Subjects, allowed by ancient Cuſtome, confirmed by long uſe, and to remain eſtabliſhed without overthrowing or deſtroying: But if they have been inhaunced or inlarged over their ancient and accuſtomed aſſize, then the inlargement and exceſs is onely to be abated, and no more; for the Statute of 1 *H.* 4. ſaith, *That there muſt be left ſufficient ſubſtance of the ancient:* And if any new Were, Stank, Stake, Floodgate, Kiddel, or other thing have of late been erected on the Rivers, which is an annoiance or hurtfull, then the ſame may be ordered by the Commiſſioners to be abated, overthrown, deſtroyed and pulled down, becauſe the ſame was erected without lawfull warrant or authority: And ſo as I take it, theſe few diſtinctions do fully declare my opinion touching thoſe matters.

The Statute of 23 *H.* 8. which I read on touching and concerning Lets, Impediments and Annoiances, hath theſe words in it in effect, *And the Commiſſion giveth authority to*

Edmond

Edmond *Lord* Sheffield, *Sir* Philip Tyrwhit, *Sir* Nicholas Sanderſon, *Knights and Baronets*, *Sir* Richard Aurcots, *Sir* John Thorold, *Sir* John Read, Sir Charles Bouls, *Sir* Ralph Maddiſon, *Sir* William Hanford, *Sir* Francis South, *Knights*, Thomas Tyrwhit, John Bolles, *and* Nicholas Hamerton, *Eſquires*, *whereof the ſaid Baronet and Baronets were of the* Quorum, *to ſurvey the Walls, Streams, Ditches, Banks, Gutters, Sewers, Goats, Calceys, Bridges, Trenches, Mills, Mildams, Floudgates, Ponds, Locks, Hebbingweres, and other Impediments, Lets and Annoiances, and the ſame to cauſe to be made, corrected, repaired, amended, put down or reformed, as cauſe ſhall require, after their wiſedoms and diſcretions; and therein to ordain and do after the form, tenor and effect of all and ſingular the Statutes or Ordinances made before the firſt day of* March, *in the 23d year of* H. 8. *touching the Premiſſes, or any of them; as alſo to inquire by the Oaths of honeſt and lawfull Men of the ſaid Shire or Shires, Place or Places, where ſuch defaults or annoiances be, as well within Liberties as without, by whom the truth may rather be known through whoſe default the ſaid hurt and damages have happened; and who hath or holdeth any Lands or Tenements, or Common of Paſture, or profit of fiſhing, or hath or may have any hurt, loſs or diſadvantage by any manner of means in the ſaid Places, as well near to the ſaid Dangers, Lets and Impediments, as inhabiting or dwelling near about the ſaid Walls, &c. and Impediments aforeſaid, and all thoſe Perſons to tax, aſſeſs and diſtrain.*

In a former clauſe of this Statute, the Commiſſion giveth power to ſurvey the Walls, Banks, Ditches, Gutters, Sewers, Goats, Calceys, Bridges, Streams; In which Clauſe theſe as neceſſary Defences are ordered to be repaired.

Then comes another Clauſe, wherein theſe things are recited as Lets and Impediments, *videlicet*, Streams, Mills, Bridges, Ponds, Fiſhgarths, Mildams, Locks, Hebbingweres, Hecks and Floudgates; So that by theſe two Clauſes, the firſt ſort were to be maintained and not deſtroyed,

and the ſecond ſort ſhould have been deſtroyed and not repaired.

And if theſe two firſt Clauſes had been alone, then the Commiſſioners had been bound to maintain the one and deſtroy the other, without any toleration; but then came in the ſaid third Clauſe, which is the Clauſe of moderation, and therein as well the Defences, as the Lets and Impediments, come all in one clauſe promiſcuouſly put together; and ſo the words (*amend, correct, repair and put down*) are therein referred to them all; ſo as in my opinion all Defences, as Walls, Banks, Sewers, Calceys, Goats, *&c.* be not to be maintained, becauſe in tract of time ſome may prove unneceſſary and unuſefull, which for that cauſe may be pulled down: ſo all Mills, Mill-dams, Floudgates, Weres, Stanks, Stakes, Kiddels, and ſuch like, are not to be put down and overthrown, but ſuch as are ancient and are thereby grown to be the proper Inheritances of men, and ſuch alſo which are uſefull and neceſſary are to be maintained, kept and repaired; for in ſome great Havens and Ports, great abundance of Piles and Timberpoſts are ſet in the Waters to ſtay the rage, force and violence of the Waters for the ſafegard of the Port and Haven.

It were a very ridiculous expoſition of this Law, to urge the Commiſſioners to overthrow thoſe things which are helpfull, and not hurtfull; for this Statute did foreſee, that theſe Mill-dams, Stakes, Stanks, Floudgates, Weres, *&c.* were not at all times and in all places hurtfull, and therefore was the ſaid Clauſe of the Statute inſerted, which gave the Commiſſioners power to put down ſuch as were Lets and Annoyances in truth, and where they were uſed for ſtrengths and were of good uſe to maintain the ſame: And this conſtruction I take it is fully maintained by this Statute, but more eſpecially by the Statute of 7 *Jacobi*, *c.* 20. where Peres, Piles, Jetties, and the like, ſet for fortifications and ſtrengths, are expreſly ordered to be maintained.

7 Jac. Reg. cap. 20.

And upon this part of this Law I do collect theſe inſuing matters:

First,

First, That if one do erect and build a Were, Mill, Mildam, or other thing on a River navigable, to the hinderance of Navigation; or if there was an ancient Were which was inhaunced of late years, the Commiſſioners of Sewers are to order him that did erect the one, and he which did inhaunce the other, to pull down the firſt, and to abate the exceſs of the other at the coſts and charges of the Owner: and if he or his Aſſigns or Heir, ſhall contrary to the Decree, Order or Judgment of the Commiſſioners, after the ſame hath been reformed, relevy the ſame again, or do continue the ſame contrary to order, the puniſhment of one hundred Marks is to be impoſed upon the Offenders, as by the Statute of 1 *H.* 4. and 12 *H.* 4. formerly appeareth. 1. 1 *H.* 4. 12 *H.* 4.

And if one which is a Stranger of his mere malice or own wrong doth pitch down Piles, or ſet down Stakes in the Rivers and Streams, he is to be fined or amerced for this offence, as the caſe ſhall require, and he is to be ordered to remove the Nuſans at his own coſts and charges; and if it cannot be found out who did the Nuſans, then the Commiſſioners of Sewers are to order thoſe to remove that Annoyance which in all likelihood are to ſuſtain moſt damage thereby, *Et ita factum fuit*, in 42 *lib. Aſſiz. plac.* 15. and this Statute extendeth to Rivers and Streams navigable, as well as to ſuch as be not navigable, for Nuſances either in the one or the other are within the conuſance of the Commiſſioners; as was reſolved in *Hide*'s Caſe, *Style* 60. But a Nuſance in the High-way, though occaſioned by the penning up of water is not within their conuſance, nor have they any power to meddle therewith; or with any Nuſances in the way; And this was the Caſe of *Hide*, who was indicted before Commiſſioners of Sewers for that by reaſon of the penning up of the water in the River at his Mill, 42 *Lib. Aſſiz.* *Style* 60.

the Banks were overflown, and the High-way annoyed; And the Indictment being removed into the *King's Bench*, was there quashed for that reason.

And touching the removing of Nusances, I shall put the Commissioners some presidents ruled and adjudged in our Books of Law which come fully to the purpose of the matters and things I now treat of.

32 *Ed.* 3. In 32 *Ed.* 3. *fol.* 8. an Assize of Nusans was brought by *A.* against *B.* for that *L.* had made a Trench over a River, and drew away thereby part of the Waters and Stream another way than that which it did formerly use to run; and thereby surrounded the Grounds of *A.* and the Assize passed for the Plaintiff; and it was adjudged, that the Waters should be removed into the ancient Current and Chanel at the Costs of the Defendant, and the Plaintiff recovered his damages *Et quod defendens capiatur:* out of which case I observe these things:

First, Though an Assize was a private Action, yet the Nusans was *tam querenti quam populo* to the Plaintiff, for drowning and surrounding of his Grounds; to the people, in changing or diverting the ancient course of the Waters, so that for the people the offender was ordered to reform the Nusans, to the King he was fined, and the Plaintiff for his own private wrong recovered his damages.

19 *Ed.* 3. In 19 *Ed.* 3. *lib. Assize, plac.* 6. A Presentment was found by Jury before Commissioners, that certain persons by name had turned the course of the River of *Lee*, which is there termed the Kings Stream, and runs from *Ware* to *Waltham*, and so to *London*, and had fixed and pitched Piles and Stakes therein, by means whereof Boats and Ballangers were hindred in their passages up and down the River, and upon this Presentment it was awarded, that those persons which were presented by name, and which had done part of the Nusans, should reform the same; and because some of the parties names could not be discovered which had done o-

ther

ther part of the ſaid Nuſans, It was ordered that the Sheriff ſhould be commanded by Writ to him to be directed to reform that part of the Nuſans, taking therein to his aſſiſtance thoſe perſons who had Grounds next adjoining; And *quod defendentes ſint in miſerecordia dom' Regis*, becauſe the Nuſans was not found to be done by force.

In 19 *Ed.* 3. *fol.* 23. in the Action upon the Caſe for a Nuſans done, the Judgment in part was, That the Nuſans ſhould be removed *& cum hoc concordat*, 7 *H.* 4. 8. upon theſe three caſes I obſerve. 7 *H.* 4.

That be the Action private or popular, always one part of Judgment was, That the Nuſans ſhould be removed at the coſts and charges of him or them which did it.

Therefore theſe Caſes do fully maintain my Opinion formerly delivered: And although in all the ſaid Caſes it appeareth, that there was a legal courſe taken to remove the Nuſances, yet there is another courſe allowed of by the Law, and that is by abating of the Nuſance, in pulling or cutting the ſame down; and the Law is expreſs ſo in the point in 9 *Ed.* 4. *fol.* 35. as if it be a Nuſance done to *J. S.* he or ſome other by his directions may overthrow the Nuſans; but if it be done *ad nocumentum populi*, as in the high or royal Streams, then any Perſon prejudiced thereby may abate the ſame. 9 *Ed.* 4.

The Statute of 23 *H.* 8. 5. doth not extend, nor give authority to the Commiſſioners of Sewers to reform the great hurt and nuſance by reaſon of the ſand riſing out of the Sea, and driven to Land by Storms and Winds, as was declared by Parliament *Stat.* 1 *Mar. Chap.* 11. and therefore by that Statute, there was a ſpecial proviſion to enable the Commiſſioners of Sewers for the County of *Glamorgan* to reform the ſame, *Co.* 4. *Inſt.* 275, 276. But for all other Counties in 1 *Mar.* 11. 4 *Inſt.* 275, 276.

in *England* and *Wales*, the Commiſſioners of Sewers have no power to meddle therein.

To make a Stream navigable.

BUT it hath been objected to me by way of Interogation, Can the Commiſſioners of Sewers make an unnavigable River or Stream to become or to be made navigable by theſe Laws of Sewers, yea or no? Touching which I ſhall deliver my Opinion as followeth:

If this could have been done by the Commiſſioners of Sewers, then what ſhould it have needed to have procured Acts of Parliament for the doing thereof, as 9 *H.* 6. *cap.* 9. to make the River of *Lee* navigable, and 6 *H.* 8. *cap.* 17. a Statute to make the River at *Canterbury* navigable; and in 31 *H.* 8. *cap.* 4. to make the River of *Ex* near *Exeter* navigable: and 27 *Eliz. cap.* 20. to make a River navigable at *Plymouth*; and in 3 *Jac. cap.* 10. for making *Thames* navigable in the Counties of *Oxford*, *Berks*, *Wilts* and *Gloceſter*: Theſe in truth are good Arguments, but not convincing Proofs; for I am of opinion, that if Streams cannot be made navigable unleſs there were certain Mills, Weres, Stanks or Kiddels removed which be the Inheritances of private Perſons, and have had continuance time out of memory, then directly the Commiſſioners of Sewers have not power to raze or impair theſe by the removing thereof, to make the Stream navigable: but in theſe Caſes a new private Act of Parliament muſt be obtained for the effecting thereof, which was the occaſion many of the ſaid private Statutes were obtained: But if none of theſe inheritable Incumbrances ſtand in the way, but that by the cleanſing or deeper caſting of the Chanel the ſame may be made navigable, Then I am of opinion, the Commiſſioners of Sewers have power to doe the ſame, and there be words in our Statute will bear this Expoſition (*videlicet*) *And to cleanſe and purge the Trenches, Streams, Sewers, Gutters and Ditches, in all Places neceſſary.*

And

And herewithall I intend to close up this day's Exercise with this short Conclusion; that is, That *E.* was no sufficient Freeman, nor was reſiant, nor had Goods of value to make him a competent Commiſſioner; That notwithſtanding *B.* and *C.* and the Counteſs of *Warwick* were competent Commiſſioners, and they joining with three of the *Quorum* had power to make and ordain Laws of Sewers; and becauſe this Were was newly erected, therefore the Law and Ordinance made to raze it and to pull it down was a good Law, and warranted by this Statute, *&c.*

Finis hujus Quartæ Lectureæ.

Lectura

Lectura Quinta.

GEnerous Auditors, my Fellows and Friends of this moſt famous and renowned Inns of Court, I have ſailed ſo far within the Land, that my Ship hath taken up her Harbor in the Inland Streams, and I my ſelf am got up to the higheſt Mountains, to the end I might take the view and ſurvey of all my former days labours; and this being the laſt day of my reading, I muſt now make my accompt to you of my Stewardſhip: The Talent which was delivered me when I entered upon my firſt day's Exerciſe, was this worthy Statute of Sewers, which I have put forth to the beſt uſe I could in my poor skill and underſtanding; But in the caſting up of my Accompts, it may be it will come ſhort of your expectations; if it do, I pray you help to increaſe it out of your abundant ſtore; and conſider with your ſelves, that your Reader took in hand to read upon a Maiden-law, which never before this time abode his Expoſition in any Inns of Court, and our Law-books are exceeding ſcarce in the handling of matters of this kind and nature; and ſo I wanted thoſe means and helps which many other Readers have had, who have taken upon them to make their readings of Statutes formerly read on, and which have received a more plentifull Expoſition in our Books and Terms of the Law than this of mine hath done.

It hath been the ancient cuſtome of this Houſe, for the Reader in his laſt day's Exerciſe to make a brief repetition in the manner of an Index, of the moſt ſubſtantial heads of his Statute, and of his diviſions: And becauſe every profeſſion is moſt graced when it is followed and trode out in the ſteps of learned Predeceſſors, I intend therefore to be

no Changling, nor mean I to produce or bring up new uſages, leſt old Cuſtome ſhould forget what her ſelf had been: In this manner therefore do I make my Repetition;

Firſt, I delivered my opinion touching the extent of this Statute, which was as large as the Realm of *England*; and that the Engliſh Seas were within the Realm.

I made it to appear, that the Dominion and Empire of theſe Seas, The legal power of adminiſtration of Juſtice, The property, profit and poſſeſſion thereof, doth appertain to the King.

And that theſe Profits { Real and / were of two kinds, { Perſonal.

The Real profits were the Grounds relinquiſhed by the Sea, which were always ſuch Grounds as had been always before covered with Waters: But Shores and ſuch Grounds which *Alternis vicibus*, were wet and dry, were not accounted relinquiſhed Grounds, and that relinquiſhed Grounds belonged to the King; but the Shore and caſual drowned Grounds might belong to a Subject.

The Perſonal Profits of the Sea did conſiſt in { Wreck. / Flotſan. / Jetſan. / Ligan; and

great Fiſhes, which are due to the King by the Royal Prerogative of his Crown; But Subjects might have the Inheritance of the firſt four by Preſcription, and of the laſt by Charter from the King.

Then I deſcended into Iſlands; Which are of two ſorts:

Firſt, On the Sea, old ones and new ones, That both were within the King's power, and the new ones His in property.

Freſh Iſlands in the Land might belong to Subjects; The nature of them all were, that they were *undique circumdatæ aquis*.

I then

I then landed at the Shore, which in definition containeth thoſe Grounds which extend from the loweſt Ebb to the higheſt Floud; That the King had the property thereof *de Jure*, a Subject might have it *ex perquiſito*, and the People had their *uſum neceſſarium*.

I proceeded farther to the Coaſts, whoſe content and contingent I deſcribed ſo near as by Hiſtories I could inform my ſelf; And Shores and Coaſts I held them to be *Maris acceſſoria*.

From theſe I proceeded to Creeks, Havens and Ports, and theſe I ſet forth in their ſeveral kinds.

And I concluded with the compaſs of my Statute and my Commiſſion, and with the diverſity thereof, That within the circle of my Statute, Seas, Iſles, Shores, Coaſts, Ports, Havens, Creeks gained, and relinquiſhed Grounds were comprehended, becauſe that might depend (*in poſſe*) but yet the Commiſſioners which was (*in preſenti operativè*) did extend but to the utmoſt Banks and Walls towards the Seas: And I concluded the points of my Caſe with the difference between Grounds left and Grounds gained from the Seas; and thus I ended my Firſt Lecture.

The Second Lecture.

IN my Second Lecture I came on Land, and took upon me to ſet forth her Friends from her Foes; her Friends I counted ſuch as had defended her from the violence of the Seas, and from inundation of Salt-waters.

And theſe were her Friends (*viz.*) Banks, Sewers, Goats, Calceys and Bridges; theſe are to be maintained and repaired, and are the Defences which I fully treated of.

And theſe were the Enemies, Streams, Mills, Ponds, Fiſhgarths, Milldams, Locks, Hebbingweres, Hecks and Floudgates.

Theſe are Lets and Impediments which this Statute ſpeaketh of, and are to be corrected, reformed or put down as cauſe ſhall require.

I ſhewed then that Rivers were of two kinds, Royal and Common Rivers; That there were other inferior kinds of thoſe watery inſtruments which might take place after Rivers, as Ditches, Gutters, Sewers, Pools, Ponds, Springs.

That Water is the ſubſtantive of all theſe, and if it be a running Water at random, then it is a Stream; if it be a running Water, and pent within Walls or Banks, then it is a River, Gutter, Ditch or Sewer; Theſe in their ſeveral kinds I did diſtinguiſh; And Springs I held to be the vital ſpirit of them all.

I then deſcribed the Commiſſioners manner of proceedings, which might be three manner of ways;

- By view and ſurvey, and wherein they conſiſted.
- By Jury, and on what parts that ſtood.
- By diſcretion, and the diverſities and definition thereof.

After theſe I took upon me, by how many ſeveral ways the Defences might be maintained, which were nine in number,

1. Frontage.
2. Ownerſhip.
3. Preſcription.
4. Cuſtome.
5. Tenure.
6. Covenant.
7. *Uſus Rei.*
8. A Townſhip; and
9. By the Laws of Sewers.

All theſe I proved by Reaſons, Preſidents and Authorities, and did at large diſcourſe of them.

Then I came by the courſe of this Caſe to treat of Seſſes, Taxes and Lays ſet by Commiſſioners of Sewers, whereby I found ſome Inheritances there were which were ſubject to theſe Seſſes; as thoſe that follow Houſes, Land, Meadow,

dow, Paſture, Woods, Heaths, Furs, Moors, Mariſhes, Rents, Ferries, Piſcaries, Commons, Free paſſage, Parks, Warrens.

And many Inheritances I found in reaſon freed from theſe Taxes and Lays, as Tythes in Spiritual Hands, Annuities, Chaſes, Penſions, Proxies, Portions, Marts, Fairs, Markets, Offices, things in Action, Conditions, Contingents, Uſes, Preſentations, Founderſhips.

I alſo found theſe Seſſes of three kinds, *viz.*
- Cuſtomary, and then they may bind the Mountains as well as the Valleys.
- Hereditary, and then the particular Tenant and the Reverſion muſt both contribute.
- Temporary, which bound the Poſſeſſor.

And here I ended my ſecond day's Lecture.

The Third Lecture.

MY Third Lecture I did diſtribute into three general Heads, which were merely the grounds of the execution of theſe Laws.

Which conſiſted either in puniſhing the Body and Perſon of the Delinquent with
1. Impriſonment. 1.
2. Fine: and
3. Amerciament.

Or in doing execution upon the Offendor's Eſtate,
1. By diſtreſs: or 2.
2. By ſale thereof.

Or

Or otherwiſe in extending it upon a Man's perſonal Eſtate, by
- 1. Charging of the Land perpetually: or
- 2. By the abſolute ſale thereof.

And under theſe general Rules I compriſed theſe particulars which follow:

Firſt, For the Honour of this Commiſſion, and for the more neceſſary execution of theſe Laws, I found them out a Court, wherein I ſet forth in what Caſes Commiſſioners might impriſon the Bodies of Delinquents, and in what Caſes they might impoſe a fine, and when amerciaments be due; and then I ſhewed that for ſome tranſgreſſions neither impriſonment, fine nor amerciament was to be impoſed.

I then came to Diſtreſſes, and held a treble diſtinction of them (*videlicet*) that ſome were
- 1. Judicial, and iſſued out of the Judicial Records of this Court.
- 2. Other Miniſterial.
- 3. The third Legal; wherein all theſe Diverſities I ſcrewed out by proved Authorities.

Then I ſhewed in what places theſe Diſtreſſes might be taken, when upon the Land charged, when within any place within the extent of this Commiſſion, and ſometimes within any place of this Realm; And when the proper Goods of the Party might be taken, and when the Goods of Strangers, and when Goods may be ſold by this Law.

Afterwards according to the order preſcribed me by my Caſe, I declared that there were ſome Interrupters to the execution of theſe Diſtreſſes.

The

The one was by ſuing Replevins, wherein I took theſe diverſities.

That a Sheriff being an inferior Officer could not of his own power deliver a diſtreſs taken by warrant of Sewers; But that the Commiſſioners of Sewers are bound to obey a Replevin coming out of the King's Courts at *Weſtminſter*, *Quia de altiori natura*; Thus yet notwithſtanding Goods taken by a judgment were exempted from that Replevin.

Then I proceeded to the charge of Lands, whether a perpetual charge might be impoſed, or not.

And from thence I came to Sales, and thoſe I diſtributed into four points;

1. For what cauſe.
2. What Lands.
3. Whoſe Lands.
4. To whom theſe Lands might be ſold.

I after came into the Tractate of Legal Proceedings, which may be uſed in our Court of Sewers; and firſt when and which Preſentments of Sewers are traverſable, and which not.

And then wherein a Party wronged may have his juſtice in this Court, and in what caſes not.

And whether the ſtrict words of the Statute would admit of Exemptions, and the difference of them, that ſome were general, others ſpecial; and therein I ended the Third day's Exerciſe.

The Fourth Lecture.

THE fourth day I treated of the Ability and Non-ability of the Commiſſioners, either by reaſon of ſome perſonal defect, whether it conſiſted in Sex, Exile or other Impediment that way.

And what Eſtate and value of Lands made one a competent Commiſſioner, and what did the contrary; and the times when the Commiſſioner muſt have this Eſtate.

Then

Then I delivered my opinion upon the words of the Statute, which be valuable Hereditaments to inable a Commiſſioner, and which were not.

Then I proceeded to intreat of a Commiſſioners Ability in Goods and moveable ſubſtance, and which were moveable ſubſtances within this Statute, and which not.

And becauſe in the Citizen-Commiſſioner Three things were required to make him able (*viz.*) Freedom, Eſtate in goods, and Reſiancy, I therefore handled fully all theſe parts thereof.

After all which, becauſe I had before this time no fitting opportunity to treat of Lets and Impediments, I therefore in this Lecture diſpoſed my caſe in ſuch ſort as it took hold of them all.

And Firſt, Becauſe the Statute I read on confirmed all other former Laws concerning the ſame, I therefore repeated them all from *Magna Charta* to this very time, and gave an Explanation or Declaration of them all.

I then diſtributed the learning of theſe Laws into three Heads:

1. Firſt, That theſe which had the ſtrength of a Cuſtome, and were grown to be particular Inheritances of private perſons, could not be extirped.
2. Secondly, And whereas ſome were newly erected without Authority, they might be overthrown.
3. Thirdly, And whereas ſome were ancient, and were exalted above or beyond the ancient Aſſize, the exceſs might onely be abated; with theſe differences I ſatisfied theſe Statutes.

Then came I to our Statute I read on, and therein I took new diverſities that was upon the Three Clauſes of my Statute.

1. The Firſt did maintain the Defences.
2. The Second deſtroyed the Offences.
3. And the Third was a general Clauſe, reciting the Defences and Offences together, and did give the Commiſſioners power to reform or amend, repair or put down, as cauſe ſhould require.

Wherein

Wherein I publiſhed this learning thereupon, That if an old Wall, Bank, Bridge or other Defences, were found to be out of uſe, it might be extirped.

And if a Were, Mill, Milldam, Stanks, Stakes, Piles, or Floudgates were found beneficial to the publick good, they might be preſerved and maintained.

And I vouched ſome preſidents, at whoſe charges the ſaid Lets and Impediments ſhould be removed, and I ended my Argument with this, In what caſes Commiſſioners of Sewers might make unnavigable Rivers navigable, and where not; and in that I concluded my fourth Exerciſe.

This is the extent of my accompt, wherein I think I have done my ſelf ſome wrong in making ſo ſhort a Breviate, in omitting many things which I truly took pains in; but becauſe you were all preſent and privy to my layings out, I hope though I have omitted them in my extreats, you will allow me them in *Summa totalis*.

But by your good favors I intend not to break Cuſtome or Promiſe in any thing; for I have ſome ſtock more left, which I told you when I began I had caſt under hatches, which now alſo I mean to diſtribute amongſt you; And becauſe there is ſome part of this as yet left untreated of, I will now therefore proceed to the unfolding thereof.

And the ſame conſiſteth in theſe words of the Law, *That the Commiſſioners hereafter named in any Commiſſion, according to the purport of the ſame, have full power and authority to make, conſtitute and ordain Laws, Ordinances and Decrees, and the ſame Laws and Ordinances ſo made to repeal, reform, amend and make new, as the caſes neceſſary ſhall require in that behalf.*

So that whereas other Judges have power onely *Jus dicere*, theſe Commiſſioners have alſo power *Jus facere*; yet this Statute gives not the Commiſſioners of Sewers abſolute power and authority to make and ordain Laws but *ſecundum quid*; for theſe Laws which they are to make, muſt be for the ſafegard, conſervation, redreſs, correction and reformation, and more than theſe, they muſt be neceſ-

ſary and behovefull; ſo they muſt not be made out of ſelf-will, and affection, but after their Wiſedoms and Diſcretions.

Wherein I conceive, that never a Sentence in this Statute is ſeaſoned with more variety of Caveats and grave directions than this Statute is in this very clauſe of making new Laws; ſo that theſe Laws ought to be made to amend, not to make worſe; they muſt be neceſſary, not nugatory, they are to be compoſed with Wiſedom, and diſpoſed of with good Diſcretion, and they ought chiefly to be made *pro bono publico*, and not *Pro privato alicujus*.

New Laws are to be ordained for theſe purpoſes onely, that is, either for making and erecting of new neceſſary Defences, or for the overthrowing of ſome unneceſſary Lets and Annoiances, or for the continuance of the Ancient.

And in alteration, new addition, or diminution of a Wall, Bank, Sewer, Goat, Calcey or other Engine, a new Law is to be made for the effecting thereof.

Alſo if an ancient Wall, Bank or other Defence be worn out of uſe, and is altogether unneceſſary; but in the Wiſedom and Diſcretion of the Commiſſioners, and that a new one in another place were more convenient for the ſafety of the Countrey; this muſt be all done by a new Law.

But here a matter of Law will ariſe, and another matter of great caution: The matter of Law will reſt in this, Whether an ancient Wall, Bank or other Defence which is grown out of uſe, may be overthrown and pulled down; and in my opinion it may, by the ſaid third clauſe of the Statute, wherein power is given either to maintain them or to put them down.

But becauſe I have formerly handled this point, I will therefore proceed to the caution which is of great weight and importance; for whereas one or more perſons are by Tenure, Covenant, Cuſtome, Preſcription or otherwiſe bound and tied to repair and maintain the ſaid ancient Bank, Wall,

Wall, Sewer, or other Defence at their ſeveral and peculiar charges; if then the Commiſſioners of Sewers ſhould make a Law to overthrow or remove the ſame, and ſhould execute the ſame accordingly; and then ſhould make a Law to erect and build a new Wall, Bank or other Defence in another place more convenient, yet the parties which were bound to maintain and repair the former old Defences, ſhould not ſo be tied and bound to repair and maintain theſe new erected ones, becauſe by the deſtroying of the ancient Walls and Banks, the Preſcriptions, Cuſtoms, Tenures and Covenants were either utterly diſſolved, or otherwiſe ſuſpended; and the charge for the erecting and maintaining of the new ones are to be laid on the Level: So that it behoveth Commiſſioners to be carefull in theſe affairs, elſe things in the Concluſion may fall out contrary to their expectations; for it is well ſaid, That *Rerum progreſſus oſtendunt multa quæ in initio nec præcaveri aut prævideri poſſunt.*

In making new Laws and Ordinances theſe things are alſo conſiderable;

Firſt, What the matter of the Law is which is to be enacted. 1.

Secondly, When the matter is known, then to weigh it well, whether if it be made, if then it will prove neceſſary and behovefull for the good of the people; and this neceſſary point is to be ſcanned by the Counſel and advice of the moſt diſcreet and experienced perſons, and of the beſt tried judgments in matters of this nature. 2.

And Thirdly, to conſider what charge the work will coſt, for the which this Law muſt be made; for in Scriptures he is not counted ſapient that before he build a houſe will not firſt count the charge of it. 3.

And Fourthly, What perſons muſt bear this charge, leſt it prove too burthenſome; and this muſt be directed by the ability of the people which are to be charged, and by the ſafety and commodity they are to have by the work. 4.

I obſerve alſo that this Statute uſeth three words, which are all powerfull in ſignification and operation, *videlicet*, *Laws*, *Ordinances* and *Decrees*; and I think it fitting for me, ſo near as I can, both to deliver the definitions of them, and the differences between them.

A Law.

A Law is properly a matter which hath taken his eſſence and power by a Cuſtome time out of memory, as the Commonlaws have done; Or elſe is a matter acted and enacted in Parliament by the King and the great Counſel of the Realm, and by the Authority thereof, for the ordering of mens Bodies, Lands and Goods; and ſuch a Law is hereby intended, becauſe the Laws which the Commiſſioners ſhall make have the power of an Act of Parliament to ſtrengthen and aſſiſt them, and they are to receive life and perfection from this Statute I read on.

Ordinance.

AN Ordinance is a word having a more private and leſs powerfull ſignification than the word *Law* hath; for it is a Law but of a ſecundary power, enacted by a Corporation, Company or Commiſſion, proceeding meerly out of the Power and Prerogative of the King by Charter, Grant or Commiſſion warranting the ſame, as thoſe Corporations, Societies and Companies which have power by Charters or Patents to make the ſame; as is ſet forth in the caſes of the City of *London*, and of the Chamberlain of *London*'s Caſe in Sir *Edward Cook*'s Reports.

Caſe of the City of *London*.

Caſe of the Chamberlain of *London*.

Alſo Ordinances may be made by the power of a Court, as in a Court Baron to make Orders, or by the Inhabitants of a Town by Cuſtome, for the ordering of their Commons, repairing of their Churches and Highways: And theſe are more properly By-laws than Laws; for a Law is either the Commonlaw, Cuſtomary-law, or an Act of Parliament;

liament; all which are of greater force than any Laws made by theſe ſecundary means, which of themſelves are of little or no ſtrength but as they are aſſiſted by other primary powers.

Decree.

A Decree is neither a Law nor Ordinance in proper definition, but is onely a Sentence or Judgment in a Court of Juſtice, delivered or declared by the Judges there, by and through the power and ſtrength of a general former Law; for *Decretum eſt Sententia lata ſuper Legem.*

So that a Law is a general direction for a multitude.

An Ordinance is a ſubordinate direction, proceeding out of a more general power.

And a Decree is a Sentence delivered for or againſt a particular perſon, grounded upon the ſaid Laws and Ordinances.

Continuance of Laws.

IT comes now fitly for me in turn and courſe to declare the continuance of theſe Laws, Ordinances and Decrees; for it is to be obſerved that ſome of them be but temporary, though others perpetual.

The words in our Statute are, *That every Statute and Ordinance made before the Statute of* 23 H. 8. *concerning the things and matters therein mentioned, as well in the time of* H. 8. *as of any of his Progenitors, not being contrary to this Statute, or heretofore repealed, ſhall ſtand in force for ever; and are commanded to be put in due Execution:* But this clauſe is intended of all Acts of Parliament made touching the Sewers, and be not intended or meant of Laws and Ordinances made by the Commiſſioners of Sewers themſelves.

Laws

Laws and Decrees made for ſale of Lands by the Powers and Authorities of this Statute, are to be made and ingroſſed into Parchment, and certified under the Seals of the Commiſſioners into the Chancery, and the King's Royal Aſſent had thereto, under the Privy Seal, ſhall alſo ſtand good and effectual.

And all Laws and Ordinances written in Parchment, and indented, and under the Seals of the Commiſſioners, whereof the one part ſhall remain with the Clerk of the Sewers, and the other part to remain in ſuch places as the Commiſſioners ſhould appoint (notwithſtanding the ſame be not certified into the Chancery, nor the King's Royal
13 *El. cap.* 9. Aſſent be had thereto) ſhall continue in force till the ſame ſhall be altered, repealed or made void by another Commiſſion of Sewers, although the former Commiſſion by the which theſe Laws were made were determined by *Superſedeas*.

The Commiſſion is to continue for ten years from the
13 *Eliz.* date thereof by force of the Statute of 13 *Eliz.* yet notwithſtanding all Laws and Ordinances which are written in Parchment, indented and ſealed by the Commiſſioners of Sewers, without certifying into the Chancery, or the King's Royal Aſſent had thereto, ſhall notwithſtanding the determination of the Commiſſion by the Expiration of the ſaid ten years, continue in force for one whole year next enſuing, to be put in Execution for that time by ſix Juſtices of the Peace, whereof two to be of the *Quorum*, but then the power of the Juſtices of the Peace is ceaſed by the coming of a new Commiſſion of Sewers.

All other Laws and Ordinances of Sewers which are but made and writ in Paper, or which be but in Parchment, and not Indented, or which be Indented alſo, if not ſealed, continue in force no longer than that Commiſſion continueth by the Power whereof they were made.

And ſo by this ſhort Declaration I have made, the Commiſſioners may the better obſerve how long time Laws and Ordinances of Sewers are to continue in force; yet though they

they lose their vigor they may notwithstanding be revived by the power of a new Commission, or remain for presidents for after Ages to imitate.

Repealing of Laws.

IN this last Place I intend to deliver my Opinion, what Laws, Ordinances and Decrees may be repealed, altered or made void by the Commissioners of Sewers.

Therefore it is first to be considered, what Grounds are to be observed in repealing or altering former Laws.

It appears in *Esther*, that the Laws of the *Medes* and *Persians* were so perdurable, as they could never be changed: And in my Opinion there is required as great foresight, Judgment, and as sound discretion and mature deliberation in repealing of old Laws, as in making new ones; For *Quæ preter consuetudinem & morem major' fiunt neque placent neque recta videntur.*

I have noted how carefull and constant the Lords of the Parliament house were in the 20 year of *H.* 3. when they all cried out aloud *Nolumus leges Angliæ mutare.*

Seeing therefore there ought to be great care in making Laws, so must there be great heed taken in repealing of Laws.

And because Commissioners of Sewers have power herein, I will therefore deliver my Opinion how far that power will extend: And if one note this Branch of the Statute well, he shall well perceive the Judicious care taken by the Parliament in penning of it; For the words be, *That the Commissioners of Sewers should have power and authority to make, constitute and ordain Laws, Ordinances and Decrees, and the same Laws and Ordinances* (omitting the word Decrees) *to alter, repeal and make void*; for a Decree is a Judgment, and is *Finis operis*, and a Judgment cannot be reversed without a Writ of Error: Neither can a Sentence or a Decree in Chancery be reversed without a Bill of Review; neither can the Commissioners of Sewers reverse a

Judg-

Judgment or Decree of Sewers Judicially pronounced, which is a Judgment upon a Tryal betwixt the King and the party, or betwixt party and party, without a Bill of Reverſal; for it is truly ſaid, *Quod naturale eſt unumquodque, diſſolvi eo ligamine quo ligatum eſt.*

A Writ of Error lay at the Commonlaw for to reverſe a Judgment given by Commiſſioners of Sewers when the Commiſſion was in Latine, as is ſet forth in the Regiſter, being then one of the ſpecial Commiſſions of *Oyer* and *Terminer*; but ſince the Commiſſion was put into the Engliſh Frame, the Writs of Error ceaſed.

A Law for ſale of Lands ingroſſed into parchment, and certified into the King's Court of Chancery, with the King's Royal Aſſent had thereto, is not reverſable without an Act of Parliament; but then the ſaid Sale muſt be made according to the Form, Frame and Power of this Statute.

For put the Caſe that *A. B.* holdeth his Lands of *J. S.* by the payment of Twenty Shillings yearly towards the repair of ſuch a Bridge Bank, or Wall, it fortuneth that *A. B.* paid the Twenty Shillings yearly to his Lord for that purpoſe, who neglecteth to pay it, though he be thereto ordered and aſſeſſed to pay the ſame to the ſaid repairs by the Commiſſioners of Sewers, the Seigniory of Twenty Shillings yearly is to be decreed, and not the Land, for that the fault was in *J. S.* and not in *A. B.* the owner of the Land.

If any perſons be by preſcription, Cuſtome, Tenure, Covenant or otherwiſe, bound to repair Walls, Banks or other Defences of Sewers, the Commiſſioners have not any power by their Commiſſion to repeal, alter or make void any of theſe, becauſe theſe are eſtabliſht by the Commonlaw, and Cuſtoms of the Realm, and not by the power of the Commiſſion of Sewers: But their power is to repeal, alter or make void Laws and Ordinances made by themſelves, or by the power of their Commiſſion: And ſo the words of their Commiſſion plainly deſcribe it; For thereby they have power to make Laws and Ordinances, and the ſame to repeal, alter and make void, ſo they muſt be the ſame

and

and no other: And herein I end all my arguments and diſcourſe upon this Statute, for I accompt all the reſt which remaineth unſpoken of not to be worthy of a Reader's dialect, becauſe I have fully handled all the Materials of this worthy Law; And therefore I may juſtly conclude my argument with this, That *Finitum eſt hoc opus & conſummatum.*

Certiorari's and Returns.

ALthough by the Statute of 13 *El. cap.* 9. it is enacted, That the Laws and Ordinances of the Commiſſioners of Sewers ſhall continue in force as therein is appointed, and that the ſaid Commiſſioners, or any of them ſhall not be compelled or compellable to make any certificate or return of any their ordinances, Laws, or doings by the authority of any the ſaid Commiſſions, nor ſhall have any Fine, Pain or Amerciament ſet upon them or any of them, or any ways be moleſted in Body, Lands or Goods for that cauſe; yet the Court of King's Bench do not take themſelves to be reſtrained by thoſe general words. And it was ſaid by the Judges there, in the caſe of *Smith* and others, *Hil.* 21 & 22 *Car.* 2. that it was never doubted but that the Court of King's Bench might queſtion the legality of the Commiſſioners of Sewers orders notwithſtanding that Statute; for it ſhall not be ouſted of its juriſdiction, by general words in an Act of Parliament, without expreſs and particular words; *Modern Reports* 44, 45. And in the

13 *Eliz.* c. 9.

Modern Reports 44, 45.

the Caſe of *Commins* and *Maſſam*, *Paſch.* 18 *Ca.* 1. *B. R.* If the Commiſſioners of Sewers proceed where they have no juriſdiction, or without Commiſſion, or contrary to their Commiſſion, or not by Jury (where a Jury is requiſite) *&c.* their doings may be examined and corrected in a ſuperior Court, *March* 197, 198.

March 197, 198.

And accordingly Writs of *Certiorari* have been from time to time as well ſince as before the ſaid Statute of 13 *Eliz.* granted to remove into the *King's Bench*, their Orders and Proceedings, and Preſentments taken by them; and ſuch Orders, Preſentments and Proceedings have been quaſhed there. See *Stile* 13, 60. 85. 185, 191, 192. *Siderfin* 1. 145. And the Commiſſioners of Sewers have been brought into that Court by Attachment, and there fined, for proceeding to fine a Perſon, after a *Certiorari* was delivered to them, *Modern Reports* 44, 45. And that Court have taken upon them to confirm a Decree of the Commiſſioners of Sewers; *March* 201. And have confirmed their Order for part, and quaſhed it for other part, *Siderfin* 1. 145. And may moderate a fine ſet by the Court of Sewers, *March* 202.

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Siderf. 1. 145.

Modern Reports 44, 45.

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Siderf. 1. 145.

March 202.

And whereas it hath been objected, that the Statute of 23 *H.* 8. 5. hath appointed the Orders and Proceedings of the Commiſſioners of Sewers to be in Engliſh, and conſequently hath taken away

23 *H.* 8. *c.* 5.

away the *Certiorari*, for that the Court of *King's Bench* can judge onely of Proceedings in Latin; to which Opinion *Mallet*, Juſtice *B. R.* ſeems to incline in the Caſe of *Commins* and *Maſſam*, *Paſch.* 18 *Car.* 1. It was reſolved, that a *Certiorari* to the Commiſſioners of Sewers lies ſince that Statute, and is not taken away thereby, *March* 197, 198, 199. *March* 197, 198, 199.

In *Apſley*'s Caſe, 17 *Car.* 1. *B. R.* where certain Orders made againſt him by the Commiſſioners of Sewers at *Weſtminſter* were removed by *Certiorari* into the Court of *King's Bench*, theſe Exceptions were taken to the return. 1. It doth not ſay, that the Commiſſion of Sewers was under the Great Seal. 2. It appears not that three of the Commiſſioners who made the Orders were of the *Quorum*, as the Statute of 23 *H.* 8. 5. appoints. Nor 3. That the Place touching which their Orders were made was within *Weſtminſter*, and ſo it cannot be known whether it was in their power by virtue of their Commiſſion to make any Orders touching that Place; And for theſe defects, the return was adjudged ill, and the Proceedings of the Commiſſioners were quaſhed: And though *Hales* moved for liberty for the Commiſſioners to amend their return, it was denied by the Court, becauſe the Return was made the term before, *Stile* 85. 23 *H.* 8. 5. *Stile* 85.

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